2011

Enrique Antonio v. Certified Building Maitenance, State Farm Fire and Caualty Company, and Workers Compensation Fund : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

REPLY BRIEF OF THE APPELLANTS IN SUPPORT OF PETITION FOR REVIEW

ENRIQUE ANTONIO, Petitioner, **vs.** **CERTIFIED BUILDING MAINTENANCE, STATE FARM FIRE AND CASUALTY COMPANY, and WORKERS COMPENSATION FUND,** Respondents. Agency Decision No. 09-0811 Utah Labor Commission Judge Debbie L. Hann Carrier No. 44-W200-227	**CERTIFIED BUILDING MAINTENANCE and STATE FARM FIRE AND CASUALTY COMPANY,** Petitioners/Appellants, **vs.** **UTAH LABOR COMMISSION, APPEALS BOARD OF THE UTAH LABOR COMMISSION, ENRIQUE ANTONIO, and WORKERS COMPENSATION FUND,** Respondents/Appellees. Appellate Case No. 20110549-CA
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1. The Reply Brief of the Appellants in Appellate Case No. 20110549-CA complies with the type-volume limitation of Utah R. App. P. 24 (f)(1) because:

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Jeff Francis, Esq. (#11370)
Ruegsegger Simons Smith & Stern, LLC
Attorneys for Petitioners/Appellants

Dated: 2-22-12

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ARGUMENTS

CBM and State Farm received a Brief from WCF. No other briefs from Antonio or the Commission were filed with this court or received by CBM and State Farm. As a result, CBM/State Farm's arguments here are in reply to the Brief filed by WCF.

The Issues and Arguments

As an initial observation, WCF appears to lump all of CBM/State Farm's arguments under the issue of "substantial evidence." This clearly does not represent a fair reading of the issues and arguments presented by CBM and State Farm in their Brief of the Appellants. As a result, CBM and State Farm ask the court to also consider their issues and arguments which extend beyond "substantial evidence" and to note that WCF failed to address these other issues and arguments in their Brief.

The Medical Evidence Cited by WCF

In its Brief on page 3, WCF concedes that the ALJ's findings in her Interim Order did not inform the Panel that Antonio was free of left knee pain leading up to the February 12, 2009 accident (on February 11, 2009 or February 12, 2009). As noted by WCF, the ALJ was "silent" about Antonio's left knee condition during this period of time. In an attempt to fill the void left by this silence, WCF places much stock in Dr. Goucher's medical note dated March 4, 2009 that indicated the

left knee injection he provided on February 9, 2009 "worked for about a week." R., page 186, Joint Medical Record Exhibits, Exhibit 6, page 58. WCF argues that this medical evidence (which was cited three times in the medical records) could not have confused the Panel because "about a week" could have been interpreted to mean *only* the 3 days following Dr. Goucher's injection leading up to the February 12, 2009 accident. Aside from the unreasonableness of this assertion, the Panel was clearly left to determine the period of time during which the injection was effective in relationship to the February 12, 2009 accident because the ALJ did not provide this information to them. Based on Dr. Goucher's comments, the Panel may have been led to believe that the February 12, 2009 accident resulted in a minimal increase in pain. Indeed, the Panel described "some increased left knee pain" following Antonio's February 12, 2009 accident and noted that the February 12, 2009 incident was "minor" with some "increased pain for perhaps 15 minutes." R., pages 125-126. This hardly demonstrates a keen understanding of Antonio's testimony during which he stated in no uncertain terms that his left knee pain escalated from zero to "7 or 8" at the time of the February 12, 2009 accident. Conspicuously absent from WCF's argument, Dr. Goucher also indicated on March 4, 2009 that Antonio "was feeling really good *but then slowly started to get bad over the last couple of weeks.*" R., page 186, Joint Medical Record Exhibits, Exhibit 6, page 58. [emphasis supplied] This would have placed the initial

deterioration of Antonio's left knee pain *after* the February 12, 2009 accident (around February 18, 2009) thereby minimizing the effect of the February 12, 2009 accident on Antonio's left knee pain. Again, this comment by Dr. Goucher only serves to obfuscate the profound impact of the February 12, 2009 accident despite the absolute numbing effect of the February 9, 2009 injection, and does not support WCF's argument that when Dr. Goucher said "about a week," the Panel was provided an adequate description of Antonio's left knee pain levels from the February 9, 2009 injection to the time of the February 12, 2009 accident. Dr. Goucher's ultimate conclusions about whether a new injury occurred on February 12, 2009 (ambiguous as they are, but upon which WCF also affords great weight) were certainly not based on Antonio's clear, unrefuted testimony at hearing, and therefore, provided no real insight to the Panel about the effect of the February 9, 2009 injection and intense left knee pain caused by the February 12, 2009 accident despite the total numbing effect of the injection.

The only other medical evidence cited by WCF in support of the Panel's conclusions is Dr. Marble's opinion. However, Dr. Marble did not make note in his report of the effect of the injection leading up to the February 12, 2009 accident and the significant increase in pain at the time of the February 12, 2009 accident. Instead, Dr. Marble incorrectly observed that Antonio "had remained symptomatic with a marginal outcome following his knee surgery" and simply felt "a twinge of

pain in his left knee" at the time of the February 12, 2009 accident. R., page 186, Joint Medical Record Exhibits, pages 72 and 75. Again, this information, which was markedly inconsistent with Antonio's sworn testimony, failed to inform the Panel about what really happened with Antonio's left knee pain leading up to and at the time of the February 12, 2009 accident.

As a further example of WCF's struggle to minimize the ALJ's failure to provide the Panel complete information about the February 12, 2009 accident, WCF twice noted in its Brief (on pages 2 and 6) that Antonio's left knee pain returned to its "baseline" after the February 12, 2009 accident. WCF defined "baseline" as Antonio's "pre-injection status." This editorial remark appears nowhere in the medical records and illustrates the intrinsic problem with the ALJ's refusal to include in her findings to the Panel a clear understanding that Antonio's "baseline" pain prior to the February 12, 2009 accident was zero. Notably, Dr. Marble in his report simply referred to a return to "preinjury status" following the February 12, 2009 accident and made no observation that Antonio's pain before the February 12, 2009 accident was zero. R., page 186, Joint Medical Record Exhibits, page 75. When the Panel noted a return to "baseline" in their report, they were referring to "continued and increasing pain interfering with work and (Antonio's) quality of life" leading up to the February 12, 2009 accident. R., page 127. As demonstrated by the uncontroverted testimony at hearing, Antonio's

baseline pain leading up to the February 12, 2009 accident was zero, and he never returned to a zero pain level after the February 12, 2009 accident. This is information which is enormously significant considering Dr. Goucher's prediction of a period of no left knee pain after the February 9, 2009 injection for a period of at least two weeks (as stated by Antonio in his testimony). Given that the February 12, 2009 accident interrupted this period of pain relief and because Antonio's left knee pain never returned to zero after the February 12, 2009 accident, the significant effect of this accident was improperly minimized by WCF, the ALJ, and the Board. If the ALJ had provided to the Panel in her findings a complete description of Antonio's left knee pain leading up to and at the time of the February 12, 2009 accident, the Panel's concept of "baseline" prior to the February 12, 2009 accident may have been appreciably different. Because of the ALJ's failure to include Antonio's unrefuted testimony, the Panel never had an opportunity to evaluate it in arriving at their conclusions.

The Board's Rationale

As noted by WCF, the Board summarily concluded that "temporary pain relief due to the injection is not dispositive of a separate injury." R., page 183. On its face, this statement ignores the pronounced increase in left knee pain at the time of the February 12, 2009 accident despite this "temporary pain relief." Further, the Board provided no medical evidence or legal support to explain how it could arrive

at such a specific conclusion. The Panel certainly did not provide this opinion because it was not fairly apprised of the effect of the February 9, 2009 injection and the significant increase in Antonio's left knee pain when the February 12, 2009 accident occurred. Mostly, the Board's presumptive statement defines the essence of CBM/State Farm's arguments because such a statement flies in the face of the Commission's requirement to fairly and accurately adjudicate the claim based on findings which are "sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *Adams v. Board of Review,* 821 P.2d 1, 4-5 (Utah App. 1991). By simply relying on the Panel's ultimate conclusion that Antonio did not suffer a new injury on February 12, 2009, the Board committed the same error as the ALJ by predicating its order on a medical opinion founded on an incomplete assessment of unrefuted facts and then filling in the blanks with unsupported assumptions.

The Effect of the ALJ's Findings on Medical Causation

The ALJ's failure (as admitted by WCF) to provide the Panel with Antonio's unrebutted testimony that his left knee pain shot from zero up to 7-8 at the time of his February 12, 2009 accident was a significant omission which left the Panel to develop the evidence without the benefit of Antonio's own words at hearing. Because of this omission, the Panel's medical opinion concerning medical causation was distorted by the ALJ's inaccurate description of Antonio's left knee

pain in the days leading up to and at the time of the February 12, 2009 accident. WCF's attempt to support the Panel's conclusions with inaccurate and incomplete medical evidence does not change the importance of the ALJ's (and the Board's) omission.

Medical causation is an integral component in determining the compensability of the February 12, 2009 accident. *Allen v. Industrial Commission,* 729 P.2d 15 (Utah 1986). Considering that the ALJ based her final order largely on the Panel's report concerning medical causation (and that the Board subsequently supported this order), the ALJ's decision to leave out in her findings to the Panel key, unrebutted hearing testimony provided by Antonio under oath in spite of CBM/State Farm's objections cannot be excused, and constituted a failure by the ALJ to serve as fact-finder to the Panel, an abuse of the ALJ's discretion, and an abrogation of CBM/State Farm's due process rights.

CONCLUSION

For the foregoing reasons and for all the reasons included in the Brief of the Appellants, CBM and State Farm request that the portion of the Order on Motion for Review and Order of Remand of the Board dated May 31, 2011 which affirmed the ALJ's award of medical benefits against CBM and State Farm be reversed, that the Findings of Fact, Conclusions of Law and Order dated February 23, 2011 be set aside (concerning the ALJ's award of medical benefits and interest against

CBM and State Farm), that CBM/State Farm's objections to the Medical Panel Report dated December 10, 2010 be sustained, that the ALJ's order requiring CBM and State Farm to pay for Antonio's medical expenses with interest be reversed, that a hearing be ordered to clarify the Medical Panel Report dated December 10, 2010, and/or that further evidence as requested herein be submitted to the Panel for consideration and clarification.

Respectfully submitted this 22nd day of February, 2012.

RUEGSEGGER SIMONS SMITH & STERN, LLC

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing **REPLY BRIEF OF THE APPELLANTS IN SUPPORT OF PETITION FOR REVIEW WITH ADDENDUM** by overnight or regular mail on this 22nd day of February, 2012, addressed to the following:

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Mark J. Sanchez, Esq. 4543 South 700 East, Suite 100 Salt Lake City, UT 84107 **Via overnight mail (2 copies)**	Mr. Jason Moyes Certified Building Maintenance 27 S. Main Street Layton, UT 84041 **Via regular mail**

Julie Smiley

ADDENDUM

Court of Appeals of Utah.
Roberta N. ADAMS, Petitioner,
v.
BOARD OF REVIEW OF the INDUSTRIAL COMMISSION, Workers' Compensation Fund of Utah, and Unicorp, Respondents.

No. 900597-CA.
Nov. 5, 1991.

Workers' compensation claimant sought judicial review of decision of Industrial Commission denying her benefits as result of her alleged repetitive motion syndrome. The Court of Appeals, Bench , P.J., held that Industrial Commission did not sufficiently indicate factual basis for its decision merely by summarizing contradictory evidence presented, without in any way indicating which evidence it found to be more credible, and stating in conclusory terms that preponderance of medical evidence established that claimant's symptoms were not work related.

Vacated and remanded.

West Headnotes

[1] Workers' Compensation 413 ⇐1939.1

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)12A Questions of Law or Fact, Findings, and Verdict
413k1939 Review of Decision of Department, Commission, Board, Officer, or Arbitrator
413k1939.1 k. In General; Questions of Law or Fact. Most Cited Cases
(Formerly 413k1939)

Question of whether Industrial Commission's findings were sufficiently detailed to permit meaningful appellate review was legal determination that required no deference to Commission. U.C.A.1953, 63-46b-16(4).

[2] Administrative Law and Procedure 15A ⇐486

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak484 Findings
15Ak486 k. Sufficiency. Most Cited Cases

Administrative Law and Procedure 15A ⇐488

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak488 k. Conclusions. Most Cited Cases

Administrative agency must make findings of fact and conclusions of law that are adequately detailed to permit meaningful appellate review. U.C.A.1953, 63-46b-16(4).

[3] Administrative Law and Procedure 15A ⇐486

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak484 Findings
15Ak486 k. Sufficiency. Most Cited Cases

Administrative agency's failure to disclose specific subsidiary finding may or may not be fatal to agency's decision, where agency's findings reveal steps taken by agency in reaching its decision. U.C.A.1953, 63-46b-16(4).

[4] Administrative Law and Procedure 15A ⇐484.1

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak484 Findings
15Ak484.1 k. In General. Most Cited Cases
(Formerly 15Ak484)
Administrative finding may be implied if it is clear from record on review that finding was actually made as part of administrative tribunal's decision; however, reviewing court may not simply assume that any undisclosed finding was in fact made. U.C.A.1953, 63-46b-16(4).

[5] Administrative Law and Procedure 15A 750

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak750 k. Burden of Showing Error. Most Cited Cases
Party wishing to defend administrative agency's decision must carry burden of showing that any undisclosed findings were actually made. U.C.A.1953, 63-46b-16(4).

[6] Workers' Compensation 413 1741

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(P) Hearing or Trial
413XVI(P)6 Findings of Fact and Conclusions of Law by Board, Commission, or Court
413k1737 Form, Contents, and Sufficiency
413k1741 k. Recital of Evidence. Most Cited Cases
Industrial Commission did not satisfy its obligation to make sufficiently detailed findings of fact to permit meaningful appellate review, where Commission merely set forth competing diagnoses without in any way indicating which diagnoses it found to be more credible and stated in conclusory terms that preponderance of medical evidence did not establish that claimant's symptoms were causally connected to job. U.C.A.1953, 63-46b-16(4).

[7] Administrative Law and Procedure 15A 486

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak484 Findings
15Ak486 k. Sufficiency. Most Cited Cases
Administrative bodies may not rely upon findings that contain only ultimate conclusions. U.C.A.1953, 63-46b-16(4).

[8] Administrative Law and Procedure 15A 486

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak484 Findings
15Ak486 k. Sufficiency. Most Cited Cases
Mere summary of contradictory evidence presented at administrative hearing does not constitute "findings of fact" sufficient to permit judicial review; administrative agency must indicate what it determines in fact occurred, and not merely what the contradictory evidence indicates might have occurred. U.C.A.1953, 63-46b-16(4).

[9] Workers' Compensation 413 1939.5

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)12A Questions of Law or Fact, Findings, and Verdict
413k1939 Review of Decision of Department, Commission, Board, Officer, or Arbitrator

413k1939.5 k. Conflicting Evidence. Most Cited Cases

It is responsibility of administrative law judge in workers' compensation proceeding to resolve factual conflicts. U.C.A.1953, 63-46b-16(4).

[10] Workers' Compensation 413 ⇐1740

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(P) Hearing or Trial
413XVI(P)6 Findings of Fact and Conclusions of Law by Board, Commission, or Court
413k1737 Form, Contents, and Sufficiency
413k1740 k. Opinion or Reasons. Most Cited Cases

Workers' Compensation 413 ⇐1744

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(P) Hearing or Trial
413XVI(P)6 Findings of Fact and Conclusions of Law by Board, Commission, or Court
413k1737 Form, Contents, and Sufficiency
413k1744 k. Ultimate or Evidentiary Facts. Most Cited Cases

To address errors claimed by workers' compensation claimant in decision of Industrial Commission, Court of Appeals had to have findings that indicated respectively the issues decided, the legal interpretations and applications made, and the subsidiary factual findings in support of Industrial Commission's decision. U.C.A.1953, 63-46b-16(4).

[11] Workers' Compensation 413 ⇐1738

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(P) Hearing or Trial
413XVI(P)6 Findings of Fact and Conclusions of Law by Board, Commission, or Court
413k1737 Form, Contents, and Sufficiency
413k1738 k. In General. Most Cited Cases

To satisfy its statutory obligation to make findings of fact sufficiently detailed to permit meaningful appellate review, Industrial Commission, at minimum, had to identify medical condition from which claimant was suffering, and to give some explanation, factual or legal, as to how claimant failed to prove causation. U.C.A.1953, 63-46b-16(4).

[12] Workers' Compensation 413 ⇐1366

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(L) Presumptions and Burden of Proof
413XVI(L)2 Particular Matters
413k1356 Injuries or Death for Which Compensation May Be Had
413k1366 k. Aggravation or Acceleration of Previously Impaired Condition. Most Cited Cases

Workers' compensation claimant with preexisting medical condition must prove both legal and medical causation.

[13] Workers' Compensation 413 ⇐1738

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(P) Hearing or Trial
413XVI(P)6 Findings of Fact and Conclusions of Law by Board, Commission, or Court
413k1737 Form, Contents, and Sufficiency
413k1738 k. In General. Most Cited Cases

Court of Appeals is unable to assume that any given finding was in fact made by Industrial Commission, where multiple conflicting versions of facts create matrix of possible factual findings. U.C.A.1953, 63-46b-16(4).

[14] Administrative Law and Procedure 15A ⇐816

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(F) Determination
15Ak816 k. Annulment, Vacation or Setting Aside of Administrative Decision. Most Cited Cases

Administrative agency's failure to make sufficiently detailed findings of fact to permit meaningful appellate review does not necessarily require vacation of order complained of, if agency's error has not substantially prejudiced petitioner. U.C.A.1953, 63-46b-16(4).

[15] Administrative Law and Procedure 15A ⚿749

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(D) Scope of Review in General
15Ak749 k. Presumptions. Most Cited Cases

When considering error that is strictly of administrative agency's own making, such as failing to make adequate findings, any doubt about whether petitioner was prejudiced is resolved in petitioner's favor. U.C.A.1953, 63-46b-16(4).

[16] Administrative Law and Procedure 15A ⚿784.1

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(E) Particular Questions, Review of
15Ak784 Fact Questions
15Ak784.1 k. In General. Most Cited Cases
(Formerly 15Ak784)

There is substantial prejudice inherent in agency's failure to make adequate factual findings, when evidence is not clear and uncontroverted. U.C.A.1953, 63-46b-16(4).

[17] Administrative Law and Procedure 15A ⚿485

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak484 Findings
15Ak485 k. Necessity and Purpose. Most Cited Cases

Complete, accurate, and consistent findings of fact are essential to proper determination by administrative agency. U.C.A.1953, 63-46b-16(4).

[18] Administrative Law and Procedure 15A ⚿485

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak484 Findings
15Ak485 k. Necessity and Purpose. Most Cited Cases

Factual findings are integral part of logical process that administrative tribunal must go through in reaching a decision. U.C.A.1953, 63-46b-16(4).

[19] Workers' Compensation 413 ⚿1939.2

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)12A Questions of Law or Fact, Findings, and Verdict
413k1939 Review of Decision of Department, Commission, Board, Officer, or Arbitrator
413k1939.2 k. Review of Fact Questions in General. Most Cited Cases

Any doubt as to whether workers' compensation claimant was prejudiced by Industrial Commission's failure to make adequate factual findings supporting its denial of benefits would be resolved in claimant's favor in case in which evidence was not clear and uncontroverted. U.C.A.1953, 63-46b-16(4).

[20] **Administrative Law and Procedure 15A ⚿816**

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(F) Determination
15Ak816 k. Annulment, Vacation or Setting Aside of Administrative Decision. Most Cited Cases

As general rule, appropriate relief for agency's failure to make adequate findings is to vacate order complained of and to order agency to make more adequate findings in support of, and more fully articulate reasons for, the determination which it made. U.C.A.1953, 63-46b-16(4).

[21] Workers' Compensation 413 ⚿1935

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)12 Scope and Extent of Review in General
413k1935 k. Presumptions and Burden of Showing Error. Most Cited Cases

Absent adequate findings, there is no presumption that Industrial Commission's decision denying workers' compensation benefits was correct. U.C.A.1953, 63-46b-16(4).

[22] Workers' Compensation 413 ⚿1951

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)13 Determination and Disposition of Proceeding
413k1951 k. Further Proceedings Before Board, Commission, or Trial Court. Most Cited Cases

Upon vacation of Industrial Commission's order denying workers' compensation benefits, based on Commission's failure to make adequate findings in support of its decision, Commission was free to deny benefits or grant benefits as might be dictated by its new findings and conclusions of law. U.C.A.1953, 63-46b-16(4).

*3 Linda M. Barclay (argued), Howard, Lewis & Petersen, Provo, for petitioner.

Richard Sumsion (argued), Salt Lake City, for Workers Compensation Fund of Utah.

Benjamin J. Simms, Salt Lake City, for Industrial Com'n of Utah.

Before BENCH, P.J., and GREENWOOD, and ORME, JJ.

BENCH, Presiding Judge:

Petitioner Roberta Adams seeks review of the Industrial Commission's decision to deny her benefits under the Utah Occupational Disease Disability Law, Utah Code Ann. §§ 35-2-1 to -65 (1988). We vacate the Commission's order.

FACTS

Adams worked as a telemarketer for Unicorp. Her duties consisted primarily of dialing telephone numbers and talking on the telephone while sitting at a desk. She was not equipped with a headset or any type of automatic dialing equipment. She was required to dial manually and hold the receiver to her ear and mouth. After working at Unicorp for approximately one year, Adams left Unicorp to seek medical attention for debilitating pain she claimed had developed gradually as a result of her employment. In general, Adams now claims that the repetitive motion of calling on a manual phone and holding the phone to her mouth and ear caused her neck pain, neck stiffness, muscle spasm, pain in her right arm and shoulder, a "pins and needles" sensation and numbness in her right shoulder and arm, and fatigue.

When Adams informed her supervisor of her pain, he referred her to his chiropractor, Dr. Robert Pope, for treatment. Dr. Pope examined her and diagnosed her as having "cervico-brachial syn-

drome, carpal tunnel syndrome, myofascitis, and brachial neuralgia." Adams's condition was subsequently described by Dr. Pope as "repetitive motion syndrome." Dr. Pope also indicated that he believed there was a very high probability that Adams's condition resulted from her job duties.

Adams then began to see another chiropractor, Dr. Arnold Otterson, whose office was closer to her home. Dr. Otterson diagnosed Adams as having acute traumatic cervico-brachial syndrome with associated brachial neuralgia. Dr. Otterson likewise described Adams's condition as repetitive motion syndrome. He treated her for several months and her condition improved. Dr. Otterson indicated to the Industrial Commission that in his professional opinion, Adams's "condition was directly related to her employment due to repetitive use of the phone."

Adams was next seen and evaluated by Dr. Richard Jackson, an orthopedic surgeon. His evaluation indicated that Adams was suffering from a degenerative C5-6 disc. Inasmuch as Dr. Jackson did not deal with head and neck problems, he referred Adams to Dr. Joseph R. Watkins, a neurologist. Dr. Watkins diagnosed Adams as having "work related cervical strain with some head discomfort and right shoulder discomfort" and "stress syndrome with multiple other symptoms, essentially resolved with resolution of work."

The Workers' Compensation Fund (the Fund) required Adams to undergo an independent medical evaluation by Dr. Edward Spencer. Dr. Spencer observed from the medical records that Adams had spondylosis of the C4-5 and C5-6 disc with narrowing at the C5-6 level. He also observed a narrowed L4-5 and L5-S1 disc with osteophyte formation from L5 at the L5-S1 level. Dr. Spencer diagnosed Adams as having probable "conversion disorder," "chronic cervical and lumbar disc disease," " chondromalacia of the patello-femoral joint," and " obesity and poor conditioning." He further found that her major problem was psychological and did not require any additional medical or surgical treatment for her condition.

The Fund then required Adams to be examined by Dr. Leonard W. Jarcho, the *4 former head of the Neurology Department at the University of Utah. Dr. Jarcho concluded that Adams did not have any neurological problem that he could identify. He also indicated that he believed that the minimal orthopedic problem was not connected to Adams's complaints or her prior employment. Dr. Jarcho described Adams's reactions, activities and movements during the examination as "strange," and concluded that Adams was in need of psychiatric diagnosis and treatment.

As directed by the Fund, Adams was then examined by Dr. David L. McCann, a psychiatrist, who was assisted by Dr. Leslie M. Cooper, a clinical psychologist. Dr. McCann concluded that Adams suffered from a personality disorder and did not have any physical impairment or other problems associated with her employment, but that her complaints were motivated by a desire to obtain compensation.

A hearing was then held where the foregoing conflicting diagnoses were presented to an administrative law judge (A.L.J.). The A.L.J. denied benefits. Adams appealed the A.L.J.'s decision to the Commission, which affirmed the decision and adopted the findings and conclusions of the A.L.J. as its own. Adams now seeks review of the Commission's decision.

Adams presents three claims for our determination: (1) the Commission's findings and conclusions should be reversed because they are insufficient as a matter of law, (2) the Commission's factual findings are not supported by substantial evidence, and (3) her condition constitutes a compensable condition under *Nyrehn v. Industrial Commission,* 800 P.2d 330 (Utah App.1990) (interpreting *Allen v. Industrial Comm'n,* 729 P.2d 15 (Utah 1986)). Inasmuch as we find that the Commission's findings are insufficient and order additional findings, we do not address points (2) and (3).

STANDARD OF REVIEW

Our review of the Commission's denial of benefits is governed by the Utah Administrative Procedures Act (UAPA). UAPA provides, in relevant part:

> The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:
>
> ....
>
> (h) the agency action is ... (iv) otherwise arbitrary or capricious.

Utah Code Ann. § 63-46b-16(4) (1990).

[1] Adams claims that she is entitled to relief under subsection (h). [FN1] The question of whether the Commission's action constitutes arbitrary action for want of adequate findings is governed by our determination of whether this court is able to conduct a meaningful review. Whether the findings are adequate is therefore a legal determination that requires no deference to the Commission.

> FN1. Adams also claims the following subsections of section 63-46b-16(4) constitute grounds for relief:
>
> (c) the agency has not decided all of the issues requiring resolution;
>
> (d) the agency has erroneously interpreted or applied the law;
>
> ....
>
> (g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;
>
> Inasmuch as we reverse the Commission's order because its failure to make adequate findings constituted arbitrary action warranting relief under subsection (h), we need not address the standards of review for subsections (c), (d), and (g).

ADEQUACY OF FINDINGS

[2] An administrative agency must make findings of fact and conclusions of law that are adequately detailed so as to permit meaningful appellate review.

> In order for us to meaningfully review the findings of the Commission, the findings must be "sufficiently detailed and include enough subsidiary facts to disclose the steps by which the ultimate conclusion on each factual issue was reached." *Acton v. Deliran,* 737 P.2d 996, 999 (Utah 1987) (quoting *Rucker v. Dalton,* 598 P.2d 1336 (Utah 1979))... *5 [T]he failure of an agency to make adequate findings of fact in material issues renders its findings " *arbitrary and capricious* " unless the evidence is "clear, uncontroverted and capable of only one conclusion." *Id.* (quoting *Kinkella v. Baugh,* 660 P.2d 233, 236 (Utah 1983)).

Nyrehn v. Industrial Comm'n, 800 P.2d 330, 335 (Utah App.1990), *cert. denied,* 815 P.2d 241 (Utah 1991) (emphasis added).

The Utah Supreme Court has clearly described the detail required in administrative findings in order for findings to be deemed adequate.

> [An administrative agency] cannot discharge its statutory responsibilities without making findings of fact on all necessary ultimate issues under the governing statutory standards. It is also essential that [an administrative agency] make subsidiary findings in sufficient detail that the critical subordinate factual issues are highlighted and resolved in such a fashion as to demonstrate that there is a logical and legal basis for the ultimate conclusions. The importance of complete, accurate, and consistent findings of fact is essential to a proper determination by an administrative agency. To that end, findings should be sufficiently detailed to disclose the steps by which the ultimate factual

conclusions, or conclusions of mixed fact and law, are reached. *See generally, Rucker v. Dalton,* 598 P.2d 1336, 1338 (Utah 1979). *Without such findings, this Court cannot perform its duty of reviewing [an administrative agency's] order in accordance with established legal principles and of protecting the parties and the public from arbitrary and capricious administrative action.*

Milne Truck Lines, Inc. v. Public Serv. Comm'n, 720 P.2d 1373, 1378 (Utah 1986) (emphasis added).

[3][4][5] If agency findings reveal the steps taken by the agency in reaching its decision, the failure to disclose a specific subsidiary finding may or may not be fatal to the agency's decision. A finding may be implied if it is clear from the record, and therefore apparent upon review, that the finding was actually made as part of the tribunal's decision. *See State v. Ramirez,* 817 P.2d 774, 787-788, (Utah 1991).[FN2] We may not merely assume, however, that an undisclosed finding was in fact made. The party wishing to defend an agency decision must carry its burden of showing that the undisclosed finding was actually made.

> FN2. In so stating, we acknowledge that our ruling in *Nyrehn,* 800 P.2d at 335, a pre-UAPA case, that material subsidiary findings may not be implied is limited under UAPA and the supreme court's language in *Ramirez.* UAPA recognizes the possibility of implied factual findings. *See* section 63-46b-16(4)(g). An agency decision may therefore be upheld under UAPA despite the absence of express written findings regarding a material fact if the reviewing court can determine that the material finding was in fact made, although not expressly written.

For this Court to sustain an order, the findings must be sufficiently detailed to demonstrate that the Commission has properly arrived at the ultimate factual findings and has properly applied the governing rules of law to those findings.... It is not the prerogative of this Court to search the record to determine whether findings could have been made by the Commission to support its order, for to do so would be to usurp the function with which the Commission is charged.

Mountain States Legal Found. v. Public Serv. Comm'n, 636 P.2d 1047, 1052 (Utah 1981).

[6] The findings made by the A.L.J. and adopted by the Commission in the present case are inadequate in that they do not disclose the steps taken by the Commission in reaching its decision to deny Adams benefits. The Commission's "findings" amount to the following single conclusory statement as to causation: "The preponderance of medical evidence in this case establishes that the applicant's various listed symptoms are not related to her work as a telemarketer at Unicorp."

[7] Because the Commission concluded that Adams failed to prove causation, the Commission denied her benefits. The Commission correctly indicated in its adopted conclusions of law that causation is one of the ultimate factual conclusions that must *6 be proven by a claimant. *See, e.g., Allen v. Industrial Comm'n,* 729 P.2d 15 (Utah 1986). However, the Commission's conclusion that Adams failed to prove causation, without supporting findings, is arbitrary. "Administrative bodies may not rely upon findings that contain only ultimate conclusions." *Tolman v. Salt Lake County Attorney,* 818 P.2d 23, 31 (Utah App.1991). *See also Vali Convalescent & Care Insts. v. Division of Health Care Financing,* 797 P.2d 438, 448 (Utah App.1990) (statement of ultimate facts alone was essentially pro forma). *Cf. Mountain States Legal Found.,* 636 P.2d at 1052 ("Ultimate findings ... must be sustained if there are adequate subordinate findings to support them"). Given the numerous legal and factual questions regarding causation in this case,[FN3] the Commission's solitary finding that Adams failed to prove causation does not give the parties any real indication as to the bases for its decision and the steps taken to reach it, nor does it

give a reviewing court anything to review.

FN3. *See, e.g.,* Utah Code Ann. § 35-2-27(28) (1988); *Allen v. Industrial Comm'n,* 729 P.2d 15 (Utah 1986).

[8][9] While the purported "Findings of Fact" written by the A.L.J. contain an informative summary of the evidence presented, such a rehearsal of contradictory evidence does not constitute findings of fact. In order for a finding to truly constitute a "finding of fact," it must indicate what the A.L.J. determines in fact occurred, not merely what the contradictory evidence indicates might have occurred. "[I]t is the responsibility of the administrative law judge to resolve factual conflicts." *Lancaster v. Gilbert Dev.,* 736 P.2d 237, 241 (Utah 1987).

As is apparent in the recitation of the various diagnoses presented to the A.L.J., the doctors each had differing explanations for Adams's medical condition and whether it was caused by her employment. The evidence did not merely indicate two possible versions of a fact whereby we could conclude that the denial of benefits necessarily indicates that the Commission accepted one version over another. The evidence shows several possible configurations and degrees of injury and/or disease, if any, and the causes, if any, thereby creating a matrix of possible factual findings. A mere summary of the conflicting evidence in this case therefore does not give a clear indication of the A.L.J.'s or the Commission's view as to what in fact occurred. Since we cannot even determine why the Commission found there was no causation shown, we clearly cannot assume that the Commission actually made any of the possible subsidiary findings. The findings are therefore inadequate.

[10] In order for this court to address the errors claimed by Adams, we must have findings that indicate respectively (1) the issues decided, *see* section 63-46b-16(4)(c); (2) the legal interpretations and applications made, *see* section 63-46b-16(4)(d); and (3) the subsidiary factual findings in support of the decision, *see* section 63-46b-16(4)(g). A simple conclusion that Adams failed to prove medical causation does not contain any of the foregoing information.

[11] At a minimum, there should have been a finding in the present case identifying the occupational disease or injury, if any, suffered by Adams. The Commission could not logically conclude that Adams's medical condition, if any, was not caused by her employment without first establishing what her medical condition was.[FN4] This it failed to do. The Commission's findings of fact simply do not "resolve all issues of material fact necessary to justify the conclusions of law and judgment entered thereon." *Parks v. Zions First Nat'l Bank,* 673 P.2d 590, 601 (Utah 1983) (footnote omitted).

FN4. *See, e.g., Nyrehn,* 800 P.2d at 335 (error for A.L.J. to apply higher standard required of applicants with pre-existing conditions that contributed to the injury without first finding that the applicant had a pre-existing condition which contributed to the injury).

[12] The Commission should have also given some explanation, factual or legal, as to how Adams failed to prove causation. *7 An applicant with a pre-existing condition must prove both legal and medical causation. *See Allen,* 729 P.2d at 25-27. The Commission relied upon *Allen,* but its findings do not make it clear whether it believed that Adams failed to prove medical or legal causation. Both issues were apparently involved in this matter. Inasmuch as our standard of review varies depending upon whether Adams failed to prove legal or medical causation, the Commission's failure to identify whether Adams failed to prove legal or medical causation prevents us from reviewing that conclusion.

[13] When multiple conflicting versions of the facts create a matrix of possible factual findings, we are unable on appeal to assume that any given finding was in fact made. *See, e.g., Carlton v.*

Carlton, 756 P.2d 86, 89 (Utah App.1988) (finding giving only a lump sum total valuation of all marital property was inadequate to permit review of disputed valuations of individual marital assets). Because of the matrix of factual possibilities in the present case, we are unable to conduct a meaningful review. We therefore hold that the Commission's denial of benefits based upon a solitary finding regarding the ultimate issue of causation fails "to disclose the steps by which the ultimate factual conclusions, or conclusions of mixed fact and law, are reached," *id.,* and therefore renders the action arbitrary.

PREJUDICE

[14][15] Our conclusion that the Commission acted arbitrarily by failing to enter adequate findings and legal conclusions does not end our inquiry, however. As required by section 63-46b-16(4), the agency's error must "substantially prejudice" the petitioner before we may grant relief. The Utah Supreme Court recently indicated in *Morton International, Inc. v. Utah State Tax Commission,* 814 P.2d 581, 584-585 (Utah 1991), that the substantial prejudice language in section 63-46b-16(4) prevents an appellate court from granting relief if an agency error is harmless. The supreme court defined harmless error as being an error "sufficiently inconsequential that ... there is no reasonable likelihood that the error affected the outcome of the proceedings." *Id.* We also note that when considering an error that is strictly of the agency's own making, such as failing to make adequate findings, any doubt about whether a petitioner was prejudiced is resolved in the petitioner's favor. *Angell v. Board of Review of Indus. Comm'n,* 750 P.2d 611, 613 (Utah App.1988).

[16][17][18] We recognize as a matter of law the substantial prejudice inherent in the failure to make adequate findings when the evidence is not clear and uncontroverted. *Nyrehn,* 800 P.2d at 335. "The importance of complete, accurate, and consistent findings of fact is essential to a proper determination by an administrative agency." *Milne Truck Lines,* 720 P.2d at 1378. The findings are an integral part of the logical process a tribunal must go through in reaching a decision. *See, e.g., Allred v. Allred,* 797 P.2d 1108, 1114 (Utah App.1990) (final determination to be supported by adequate findings "made in the course of employing" the analytical approach established by the court on appeal). *Cf. Noble v. Noble,* 761 P.2d 1369, 1372 (Utah 1988) ("trial court *must* make adequate findings and conclusions demonstrating that it has considered [relevant] factors" (emphasis added)). Once an administrative agency attempts to state its findings, identify the applicable law, and articulate its logic, it may discover that critical facts are not properly before it,[FN5] that the law is other *8 than anticipated, or that its initial logic is flawed. In such situations, a result contrary to the initial conclusions of the body may be dictated. The process of articulation clearly enhances agency self-discipline and protects against arbitrary and capricious decisions. Without the safeguard of adequate findings, there is no guarantee that the agency followed a logical process in reaching its decision. If, on the other hand, the agency identifies the facts, law, and reasoning supporting its decision, it reveals its logical process and the parties can be assured that a logical process occured, even if it is in some manner flawed.

FN5. We recognize that an administrative agency may hear evidence that is legally inadmissible under the technical rules of evidence; under the "residuum rule," however, its findings of fact cannot be based exclusively on such inadmissible evidence. "They must be supported by a residuum of legal evidence competent in a court of law." *Yacht Club v. Utah Liquor Comm'n,* 681 P.2d 1224, 1226 (Utah 1984) . *See also Mayes v. Department of Employment Sec.,* 754 P.2d 989, 992 n. 1 (Utah App.1988) (explaining inconsistent standards for admitting evidence and relying upon evidence admitted). The process of articulating the critical facts gives an ad-

> ministrative agency pause to ascertain what evidence it may properly rely upon to make such findings in light of the residuum rule. *See, e.g., Tolman,* at 31-32 (at a minimum, issues regarding admissibility of evidence should have been addressed in the findings).

If an agency's logical process is flawed, its shortcomings can be corrected on review, but only if the agency creates findings revealing the evidence upon which it relies, the law upon which it relies, and its interpretation of the law. Absent adequate findings, a petitioner wishing to challenge an agency's factual findings will not be able to marshal the evidence in support of the findings. *See generally Grace Drilling Co. v. Board of Review of the Indus. Comm'n,* 776 P.2d 63, 67-68 (Utah App.1989) (party challenging factual findings of agency must marshal evidence in support of such finding and show that it is not substantial). Nor will a petitioner be able to challenge the agency's undeclared interpretation of the law or its undisclosed logic. *See, e.g., State v. Lovegren,* 798 P.2d 767, 771 n. 11 (Utah App.1990) (trial court's failure to make adequate findings "placed appellate counsel at a disadvantage in framing and developing their arguments on appeal").

[19] If findings are inadequate, this court will also be unable to effectively and efficiently perform its duty of review. "To enable this Court to determine whether an order is arbitrary and capricious, the Commission must make findings of fact that are sufficiently detailed to apprise the parties and the Court of the basis for the Commission's decision." *Mountain States Legal Found.,* 636 P.2d at 1051 (citations omitted). While these disadvantages may not be reflected in the initial outcome of the hearing below, they directly affect the ultimate outcome of the matter on review and are therefore relevant to the question of prejudice. It is axiomatic that the denial of Adams's claim without the possibility of meaningful review by this court, as provided for by UAPA, is clearly prejudicial.

The Fund has not established that the Commission's failure to make adequate findings of fact and conclusions of law was harmless as defined in *Morton International,* at 584-585. [FN6] We therefore resolve any doubt in Adams's favor and hold that Adams was prejudiced by the Commission's failure to make adequate factual findings and legal conclusions.

> FN6. It is possible in some cases that the failure to make adequate findings is nevertheless harmless. *See, e.g., Nyrehn,* 800 P.2d at 335 (failure to make findings necessary to determine whether a higher legal standard should be applied before applying the higher standard was harmless error when the undisputed facts of the case satisfied the higher standard). *Cf. Olson v. Olson,* 704 P.2d 564, 566-67 (Utah 1985) (even though findings were inadequate as to financial needs of wife, no remand was necessary because even accepting the wife's evidence as true, there was no abuse of discretion by trial court).

RELIEF

[20][21][22] As a general rule, the appropriate relief for an agency's failure to make adequate findings is to vacate the order complained of and to order the agency to "make more adequate findings in support of, and more fully articulate [the] reasons for, the determination ... made." *Vali Convalescent & Care Insts.,* 797 P.2d at 450. However, as we have acknowledged herein, absent adequate findings there is no presumption that the Commission's decision is correct. The process of articulation may or may not cause the Commission to reach a different decision. Since we vacate the Commission's order denying benefits, it is free to deny benefits or grant benefits as may be dictated by its new findings of fact and conclusions of law.[FN7]

> FN7. We express no opinion on the merits of Adams's remaining claims inasmuch as they may be resolved by the Commission's entry of adequate findings. Her remaining

claims are best left for another day.

*9 CONCLUSION

We vacate the Commission's order denying Adams benefits and direct the Commission to produce adequate findings of fact and conclusions of law and enter a new order.

GREENWOOD and ORME, JJ., concur.

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821 P.2d 1

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729 P.2d 15
(Cite as: 729 P.2d 15)

Supreme Court of Utah.
Robert A. ALLEN, Plaintiff,
v.
INDUSTRIAL COMMISSION, Board of Review, Jer Ken, Inc., State Insurance Fund and Second Injury Fund, Defendants.

No. 20026.
Nov. 14, 1986.

Worker, who sustained lower back injuries while stacking milk crates containing four to six gallons of milk, sought review of an order of the Industrial Commission, denying his motion for review of an order of an administrative law judge denying his workers' compensation claim. The Supreme Court, Durham, J., held that: (1) finding that worker's injury was not "by accident" was not based on the evidence and, thus, was erroneous, but (2) worker's claim would be remanded for further fact finding as to whether action of worker, who had previous back problems, in lifting several piles of milk crates exceeded exertion which average person typically undertook in nonemployment life and whether medically demonstrable causal link existed between worker's lifting and injury to his back.

Vacated and remanded.

Hall, C.J., filed opinion concurring in part and dissenting in part, with Stewart, Associate C.J., joining in the dissent.

Stewart, Associate C.J., dissented and filed opinion.

West Headnotes

[1] Evidence 157 ⇨18

157 Evidence
157I Judicial Notice
157k18 k. Weights, measures, and values. Most Cited Cases

Supreme Court took judicial notice that liquid milk weighs about the same as liquid water or approximately eight and one-third pounds per gallon; thus, four gallons of milk weigh about 33 pounds without the containers and crate, and six gallons of milk weigh about 50 pounds without containers and crate.

[2] Workers' Compensation 413 ⇨515

413 Workers' Compensation
413VIII Injuries for Which Compensation May Be Had
413VIII(A) Nature and Character of Physical Harm
413VIII(A)1 In General
413k515 k. What are accidental injuries in general. Most Cited Cases

For purposes of workers' compensation, key requirement of an "accident" is that occurrence be unanticipated, unplanned, and unintended; where either cause of injury or result of exertion is different from what would normally be expected to occur, occurrence is unplanned, unforeseen, and unintended and, thus, by "accident"; clarifying *Carling v. Industrial Commission*, 16 Utah 2d 260, 399 P.2d 202. U.C.A.1953, 35-1-45.

[3] Workers' Compensation 413 ⇨515

413 Workers' Compensation
413VIII Injuries for Which Compensation May Be Had
413VIII(A) Nature and Character of Physical Harm
413VIII(A)1 In General
413k515 k. What are accidental injuries in general. Most Cited Cases

For purposes of workers' compensation, proof of unusual event may be helpful in determining causal connection between injury and employment; however, proof of unusual event is not required as

an element of requirement that injury be "by accident." U.C.A.1953, 35-1-45.

[4] Workers' Compensation 413 ⚷515

413 Workers' Compensation
413VIII Injuries for Which Compensation May Be Had
413VIII(A) Nature and Character of Physical Harm
413VIII(A)1 In General
413k515 k. What are accidental injuries in general. Most Cited Cases

An "accident," for purposes of requirement that injury be "by accident" to be compensable under Workers' Compensation Act, is an unexpected or unintended occurrence that may be either the cause or the result of an injury; abandoning *Redman Warehousing Corp. v. Industrial Comm'n*, 22 Utah 2d 398, 545 P.2d 283; *Church of Jesus Christ of Latter-Day Saints v. Industrial Commission*, 590 P.2d 328 (Utah); *Farmer's Grain Cooperative v. Mason*, 606 P.2d 237 (Utah); *Sabo's Elec. Serv. v. Sabo*, 642 P.2d 722 (Utah); *Billings Computer Corp. v. Tarango*, 674 P.2d 104 (Utah). U.C.A.1953, 35-1-45.

[5] Workers' Compensation 413 ⚷568.2

413 Workers' Compensation
413VIII Injuries for Which Compensation May Be Had
413VIII(A) Nature and Character of Physical Harm
413VIII(A)5 Particular Injuries and Consequences
413k568.1 Trauma, Muscular Strains, and Consequences of Exertion and Overexertion
413k568.2 k. In general. Most Cited Cases
(Formerly 413k568)

Key question in workers' compensation case in determining causation is whether, given worker's body and worker's exertion, the exertion in fact contributed to the injury. U.C.A.1953, 35-1-45.

[6] Workers' Compensation 413 ⚷552

413 Workers' Compensation
413VIII Injuries for Which Compensation May Be Had
413VIII(A) Nature and Character of Physical Harm
413VIII(A)4 Aggravation of Previously Impaired Condition
413k552 k. In general. Most Cited

Workers' Compensation 413 ⚷568.2

413 Workers' Compensation
413VIII Injuries for Which Compensation May Be Had
413VIII(A) Nature and Character of Physical Harm
413VIII(A)5 Particular Injuries and Consequences
413k568.1 Trauma, Muscular Strains, and Consequences of Exertion and Overexertion
413k568.2 k. In general. Most Cited Cases
(Formerly 413k568)

Only those injuries which occur because some condition or exertion required by employment increases risk of injury which worker normally faces in his everyday life is compensable under Workers' Compensation Act; injuries which coincidentally occur at work because preexisting condition results in symptoms which appear during work hours without any enhancement from the work place are not compensable. U.C.A.1953, 35-1-45.

[7] Workers' Compensation 413 ⚷597

413 Workers' Compensation
413VIII Injuries for Which Compensation May Be Had
413VIII(B) Remote and Proximate Consequences
413k597 k. In general. Most Cited Cases

For purposes of workers' compensation, two-part causation test, requiring consideration of legal

cause and medical cause of injury, is required in determining whether causal connection exists between injury and worker's employment; abandoning *Billings Computer Corp. v. Tarango*, 674 P.2d 104 (Utah); *Sabo's Elec. Serv. v. Sabo*, 642 P.2d 722 (Utah); *Church of Jesus Christ of Latter-Day Saints v. Industrial Commission*, 590 P.2d 328 (Utah); *IGA Food Fair v. Martin*, 584 P.2d 828 (Utah); *Nuzum v. Roosendahl Construction and Mining Corp.*, 565 P.2d 1144 (Utah); *Jones v. California Packing Corp.*, 121 Utah 612, 244 P.2d 640; *Robertson v. Industrial Commission*, 109 Utah 25, 163 P.2d 331; *Thomas D. Dee Memorial Hospital Ass'n v. Industrial Commission*, 104 Utah 61, 138 P.2d 233; *Kaiser Steel Corp. v. Monfredi*, 631 P.2d 888 (Utah); *Schmidt v. Industrial Commission*, 617 P.2d 693 (Utah); *Residential and Commercial Construction Co. v. Industrial Commission*, 529 P.2d 427 (Utah); *Powers v. Industrial Commission*, 19 Utah 2d 140, 427 P.2d 740; *Baker v. Industrial Commission*, 17 Utah 2d 141, 405 P.2d 613; *Purity Biscuit Co. v. Industrial Commission*, 115 Utah 1, 201 P.2d 961. U.C.A.1953, 35-1-45.

[8] Workers' Compensation 413 ⇐553

413 Workers' Compensation
413VIII Injuries for Which Compensation May Be Had
413VIII(A) Nature and Character of Physical Harm
413VIII(A)4 Aggravation of Previously Impaired Condition
413k553 k. Necessity of accident and causal connection. Most Cited Cases

Where claimant suffers from preexisting condition which contributes to injury, unusual or extraordinary exertion is required to prove "legal causation," for purposes of two-part causation test for determining whether causal connection exists between claimant's injury and claimant's employment; where there is no preexisting condition, a usual or an ordinary exertion is sufficient to prove legal causation. U.C.A.1953, 35-1-45.

[9] Workers' Compensation 413 ⇐597

413 Workers' Compensation
413VIII Injuries for Which Compensation May Be Had
413VIII(B) Remote and Proximate Consequences
413k597 k. In general. Most Cited Cases

For purposes of legal causation element of two-part test for determining whether causal connection exists between claimant's injury and claimant's employment, precipitating exertion must be compared with usual wear and tear and exertions of nonemployment life of people in general, not nonemployment life of the particular claimant in question. U.C.A.1953, 35-1-45.

[10] Workers' Compensation 413 ⇐597

413 Workers' Compensation
413VIII Injuries for Which Compensation May Be Had
413VIII(B) Remote and Proximate Consequences
413k597 k. In general. Most Cited Cases

Under medical causation portion of two-part test for determining whether causal connection exists between claimant's injury and claimant's employment, claimant must show by evidence, opinion, or otherwise that stress, strain, or exertion required by his or her occupation led to resulting injury or disability. U.C.A.1953, 35-1-45.

[11] Workers' Compensation 413 ⇐1390

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(M) Admissibility of Evidence
413k1390 k. Injury arising out of and in course of employment. Most Cited Cases

Evidence of ordinariness or usualness of employee's exertions may be relevant to medical conclusion of causal connection between claimant's injury and claimant's employment. U.C.A.1953, 35-1-45.

[12] Workers' Compensation 413 ⇐1531.4

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(N) Weight and Sufficiency of Evidence
413XVI(N)7 Accident or Injury and Consequences Thereof
413k1531.1 Particular Injuries and Consequences
413k1531.4 k. Back injuries. Most Cited Cases
(Formerly 413k1533)

Finding that claimant's lower back injury was not "by accident" as claimant was stacking milk crates was not based on the evidence and, thus, was erroneous; claimant experienced unexpected and unanticipated injury to his back as he lifted crate of milk in cramped area of cooler, claimant had not complained of pain or limitations at his job, and no evidence indicated that injury was predictable or developed gradually as with occupational disease or progressive back disorder. U.C.A.1953, 35-1-45.

[13] Workers' Compensation 413 ⇐1950

413 Workers' Compensation
413XVI Proceedings to Secure Compensation
413XVI(T) Review by Court
413XVI(T)13 Determination and Disposition of Proceeding
413k1950 k. Instructions on remand. Most Cited Cases

Compensation claim of worker, who had preexisting back problems and sustained lower back injuries while stacking crates containing four to six gallons of milk, was remanded for further fact finding on issue as to whether moving and lifting several piles of crates weighing 30 to 50 pounds in confined area of cooler exceeded exertion average person typically undertook in nonemployment life and whether there was medically demonstrable causal link between worker's action in lifting milk crates and injury to his back and, thus, ultimately, whether his injury "arose out of or in the course of employment." U.C.A.1953, 35-1-45.

***17** Michael E. Bulson, Ogden, for plaintiff.

Gilbert Martinez, Salt Lake City, for Second Injury.

Fred R. Silvester, James R. Black, Salt Lake City, for State Ins. Fund.

DURHAM, Justice:

Claimant Robert A. Allen seeks a review from the Industrial Commission's denial of his motion for review of an administrative law judge order denying him compensation for a back injury sustained at work. For the reasons stated below, we reverse and remand.

[1] On November 23, 1982, the claimant, aged 36, was employed as night manager of Kent's Foods. The claimant testified to the following version of events at a hearing before an administrative law judge. The claimant was working in a confined cooler in the store stacking crates, containing four to six gallons [FN1] of milk, from the floor onto a cooler shelf. While lifting one crate to about chest level, he suddenly felt a sharp pain in his lower back. He immediately set down the crate and asked another employee to continue stocking the shelves. The claimant completed the one-half hour remaining in his shift doing desk work. That night the pain increased, and by morning his left leg felt numb. Four or five days later, he saw Dr. Ivan Wright about his back problem. Initial doctor visits during December were followed through with the prescribed treatment of bed rest and medication. A myelogram finally revealed a herniated disc, and the claimant spent ten days in traction in the hospital in early January. He did not return to work.

> FN1. We take judicial notice that liquid milk weighs about the same as liquid water or approximately 8 1/3 pounds per gallon. Thus, four gallons of milk weigh about 33 pounds without the containers and crate. Six gallons of milk weigh approximately 50 pounds without the containers and crate.

The claimant also testified he had a history of

prior back injuries, including a fall from a telephone pole at age fourteen which required him to wear a back brace for several months, a back injury in 1977 while lifting sand bags for the Logan School District, and another fall while working for that employer when he slipped on a slick concrete ramp and broke his coccyx. None of the prior injuries resulted in prolonged absences from work.

The testimony from other sources varied slightly from the report given by the claimant. The employer's report of injury describes the accident as "picking up freight and stocking it on shelves, lifting boxes and stacking them from truck." No specific event was mentioned in the employer's report. The medical records of treating physicians described the claimant's previous injuries, but omitted any reference to a specific incident in the cooler. Dr. Hannan, who examined the claimant on December 31, 1982, wrote, "He does not remember any distinct episode as having precipitated his current problem, however." And in a letter from Dr. Bryner to Dr. Wright dated January 13, 1983, the claimant's history was related as follows: "About six weeks ago, however, he was lifting material at work, and recalls no specific injury or stress but developed discomfort in his left groin area which ultimately extended into his big toe."

The administrative law judge found that the claimant's injury to his back on November 23, 1982, was not "an injury by accident arising out of or in the course of employment." It is apparent that the administrative law judge, using a specific episode analysis, concluded there was no "accident" because there was no identifiable ***18** event that caused the injury and because lifting the crates of milk was a routine and commonplace exertion expected of the job. The administrative law judge analogized the facts of this case to *Farmer's Grain Cooperative v. Mason,* 606 P.2d 237 (Utah 1980), where a gradually developed back injury was held to be not compensable where the condition worsened without the intervention of any external occurrence or trauma.

The sole issue on appeal is whether the claimant, who had suffered preexisting back problems and was injured as the result of an exertion usual and typical for his job, was injured "by accident arising out of or in the course of employment" as required by the Workers' Compensation Act, U.C.A., 1953, § 35-1-45 (Supp.1986). That Act, in pertinent part, provides:

> Every employee ... who is injured ... by accident arising out of or in the course of his employment ... shall be paid compensation for loss sustained on account of the injury....

Id. This statute creates two prerequisites for a finding of a compensable injury. First, the injury must be "by accident." Second, the language "arising out of or in the course of employment" requires that there be a causal connection between the injury and the employment. *See Pittsburgh Testing Laboratory v. Keller,* 657 P.2d 1367, 1370 (Utah 1983). Prior decisions by this Court have often failed to distinguish the analysis of the accident question from the discussion of causation elements. [FN2] As a result, this Court and the Commission are faced with confusing and often inconsistent precedent. For this reason we now undertake a fresh look at the policy and historical background of the workers' compensation statute in an attempt to provide a clear and workable rule for future application by the Commission.

> FN2. We note that many of our prior opinions so intermingled the causation and accident analyses that it is impossible to segregate them and determine the basis for the Court's decision. For example, the opinion in *Sabo's Elec. Serv. v. Sabo,* 642 P.2d 722 (Utah 1982), mixes the accident and causation elements in the following language: "It appears to be mere coincidence that defendant's injury ... occurred at work. Defendant bears the burden of showing otherwise. Proof of the causal relationship of duties of employment to unexpected injury is simply lacking.... [T]he Com-

mission's conclusion that an accident occurred is without any substantive support in the record." *Id.* at 726 (footnotes omitted). *See also Church of Jesus Christ of Latter-Day Saints v. Industrial Comm'n,* 590 P.2d 328, 329-30 (Utah 1979); *Pintar v. Industrial Comm'n,* 14 Utah 2d 276, 382 P.2d 414 (1963). For an example of an opinion which *does* separate the accident and causation analysis, see *Church of Jesus Christ of Latter-Day Saints v. Industrial Comm'n,* 590 P.2d 328, 330-31 (Utah 1979) (Wilkins, J., dissenting).

I.

The term "by accident" is not defined in the workers' compensation statutes. The most frequently referenced authority for the definition of "by accident" is the case of *Carling v. Industrial Commission,* 16 Utah 2d 260, 399 P.2d 202 (1965), where the term was defined as follows:

> [An accident] connotes an unanticipated, unintended occurrence different from what would normally be expected to occur in the usual course of events.... [T]his is not necessarily restricted to some single incident which happened suddenly at one particular time and does not preclude the possibility that due to exertion, stress or other repetitive cause, a climax might be reached in such manner as to properly fall within the definition of an accident as just stated above. However, such an occurrence must be distinguished from gradually developing conditions which are classified as occupational diseases....

Id. at 261-62, 399 P.2d at 203 (citing *Jones v. California Packing Corp.,* 121 Utah 612, 616, 244 P.2d 640, 642 (1952), and *Purity Biscuit Co. v. Industrial Commission,* 115 Utah 1, 201 P.2d 961 (1949)). Some confusion has developed as to whether "by accident" requires proof of an unusual event. This issue frequently arises when the employee suffers an internal failure [FN3] brought about by exertions in the ***19** workplace. It is clear, however, that our cases have defined "by accident" to include internal failures resulting from both usual and unusual exertions. *See Schmidt v. Industrial Commission,* 617 P.2d 693, 695 (Utah 1980).

> FN3. An "internal failure" refers to a category of injuries that arise from general organ or structural failure brought about by an exertion in the workplace. Internal failure claims evaluated by this Court include heart attacks, hernias, and back injuries. *See generally,* Note, *Schmidt v. Industrial Commission and Injury Compensability under Utah Worker's Compensation Law: A Just Result or Just Another "Living Corpse"?,* 1981 Utah L.Rev. 393.

This Court first discussed the term "by accident" in *Tintic Milling Co. v. Industrial Commission,* 60 Utah 14, 206 P. 278 (1922), where an accident was said to be "something out of the ordinary, unexpected, and definitely located as to time and place." 60 Utah at 22, 206 P. at 281. This definition was used to distinguish injuries which occurred gradually and were covered under statutory provisions for occupational disease. *Id.* The Court in *Tintic Milling* also acknowledged that where the claimant suffers an internal failure the "unexpected result" rule of the seminal English case of *Fenton v. Thorley,* [1903] A.C. 443, 72 L.J.K. 789, 5 W.C.C. 1, is appropriate. The Court in *Tintic Milling* observed:

> "Since the case of *Fenton v. Thorley,* nothing more is required than that the harm that the plaintiff has sustained shall be unexpected.... It is enough that the causes, themselves known and *usual,* should produce a result which on a particular occasion is neither designed nor expected. The test as to whether an injury is unexpected, and so, if received on a single occasion, occurs 'by accident,' is that the sufferer did not intend or expect that injury would on that particular occasion result from what he was doing."

60 Utah at 26, 206 P. at 282 (quoting Bohlen, *A Problem in The Drafting of Workmen's Compensa-*

tion Acts, 25 Harv.L.Rev. 328, 340 (1912) (emphasis added)). Accordingly, the Court in *Tintic* affirmed a finding that the employee, whose previous respiratory problems were aggravated by entering a roasting flue, had suffered a compensable accident.

After *Tintic Milling,* the Court temporarily rejected the "unexpected result" definition of *Fenton v. Thorley* in internal failure cases on the ground that the definition of "by accident" required an unusual occurrence or exertion. In *Bamberger v. Industrial Commission,* 66 Utah 203, 240 P. 1103 (1925), the Court denied compensation to a worker who unexpectedly suffered a heart attack while manually unloading a railroad car of coal on the ground that no overexertion occurred during the work. 66 Utah at 208, 240 P. at 1104. That decision was apparently overruled, however, when the Court embraced the "unexpected result" rule and awarded compensation to an employee who suffered a heart attack after overexertions while routinely cleaning the weirs to a city reservoir. *Hammond v. Industrial Commission,* 84 Utah 67, 87, 34 P.2d 687, 695 (1934) (Moffat, J., concurring). *Hammond* was followed in *Columbia Steel Co. v. Industrial Commission,* 92 Utah 72, 66 P.2d 124 (1937), where a unanimous Court held that the employee, who had suffered a ruptured aorta from riding a caterpillar tractor over rough ground, suffered an injury "by accident" since the result was "an unusual, unforeseen, and unexpected event or occurrence" and definite as to time and place. *Id.* at 92, 66 P.2d at 134. And, in *Thomas D. Dee Memorial Hospital Ass'n. v. Industrial Commission,* 104 Utah 61, 138 P.2d 233 (1943), the Court sustained an award of benefits to a claimant who had suffered from heart disease and experienced a heart attack shortly after moving 52 boxes weighing 50 to 100 pounds and 28 sacks of fire clay-work that was unusually heavy and greatly in excess of his ordinary duties. The Court pointed out, in dicta, that the English common law would have awarded compensation even if the exertions were ordinary and usually required as part of the job. 104 Utah at 67-71, 138 P.2d at 235-39. Quoting from the Bohlen article, *supra,* the Court observed:

> ***20** "[N]othing more is required than that the harm that the plaintiff has sustained shall be unexpected.... The element of unexpectedness inherent in the word 'accident' is sufficiently supplied ... if, though the act is usual and the conditions normal, it causes a harm unforeseen by him who suffers it."
>
> 104 Utah at 70, 138 P.2d at 237.

Six years later in *Purity Biscuit Co. v. Industrial Commission,* 115 Utah 1, 201 P.2d 961 (1949), this Court explicitly adopted the English rule for the definition of an accident and awarded benefits to a claimant who unexpectedly injured his back while stepping on the brake pedal of a delivery truck-a usual and ordinary activity. *See* 115 Utah 14-20, 201 P.2d 967-70. After summarizing early Utah cases interpreting "by accident" the Court concluded that "since 1922 this court has uniformly held that an unexpected internal failure meets the requirements of ["by accident"] and the legislature by failing to amend has acquiesced in that construction." 115 Utah at 15, 201 P.2d at 968.

The holding of *Purity Biscuit* also squarely embraced the concept that an ordinary or usual exertion that results in an unexpected injury is compensable. *See* 115 Utah at 18-19, 201 P. at 969-70. After carefully considering the legislative purpose of the workers' compensation statute, prior precedent, and public policy, the Court rejected the requirement that proof of an unusual activity or exertion be a required element of the "by accident" definition. 115 Utah at 14-20, 201 P.2d at 967-70. The Court concluded that "there is nothing in the statute which would justify a holding that an injury is compensable where overexertion is shown but is not compensable where only ordinary exertion is shown, provided that in both cases it is shown that the exertion causes the injury." [FN4] 115 Utah at 19, 201 P.2d at 970.

FN4. The holding of *Purity Biscuit* was questioned in *Mellen v. Industrial Comm'n,* 19 Utah 2d 373, 431 P.2d 798 (1967), where the opinion erroneously stated that *Purity Biscuit* "has never been cited by this or any other court to support the law of that case." 19 Utah 2d at 375, 431 P.2d at 799. In fact, by 1967 *Purity Biscuit* had been relied upon in decisions from the courts of nine other states. *Alabama Textiles Prods. Corp. v. Grantham,* 263 Ala. 179, 183-84, 82 So.2d 204, 208 (1955) (finding of unusual strain or exertion unnecessary to support conclusion that claimant suffered injury by accident); *Bryant Stave & Heading Co. v. White,* 227 Ark. 147, 151-52, 296 S.W.2d 436, 439-40 (1956) (*Purity Biscuit* cited as stating majority position that usual exertion causing an internal failure may be by accident); *Argonaut Ins. Co. v. Industrial Accident Comm'n,* 231 Cal.App.2d 111, 41 Cal.Rptr. 628, 635 (1964) (relying upon causation rule of *Purity Biscuit*); *Spivey v. Battaglia Fruit Co.,* 138 So.2d 308, 314 (Fla.1962) (back herniation from rupture of intervertebral disc satisfies statutory requirement of suddenness); *Roman v. Minneapolis St. Ry.,* 268 Minn. 367, 380, 129 N.W.2d 550, 559 (1964) (calls *Purity Biscuit* "a well-considered workmen's compensation case" that supported an award where many factors led to the disability); *Murphy v. Anaconda Co.,* 133 Mont. 198, 208, 321 P.2d 1094, 1100 (1958) (quoting favorably the reliance on *Purity Biscuit* in *Bryant Stave,* 227 Ark. at 151-52, 296 S.W.2d at 439-40, and holding that a usual exertion may lead to a compensable injury where the causal relationship is established); *Neylon v. Ford Motor Co.,* 10 N.J. 325, 327-28, 91 A.2d 569, 570 (1952) (*Purity Biscuit* cited in support of rule that internal failure from ordinary or usual exertion is an "injury by accident"); *Olson v. State Indust. Accident Comm'n,* 222 Or. 407, 416-17, 352 P.2d 1096, 1101 (1960) (O'Connell, J., specially concurring) (dissent to *Purity Biscuit* quoted); *Cooper v. Vinatieri,* 73 S.D. 418, 424, 43 N.W.2d 747, 750-51 (1950) (*Purity Biscuit* cited as an example of the divergent viewpoints for defining a compensable accident).

In addition, the decision in *Purity Biscuit* was relied upon by the majority in three Utah cases. *See Jones v. California Packing Co.,* 121 Utah 612, 244 P.2d 640, 642; *Carling v. Industrial Commission,* 16 Utah 2d 260, 399 P.2d 202; *Powers v. Industrial Commission,* 19 Utah 2d 140, 427 P.2d 740. Despite this support for the decision in *Purity Biscuit,* the Court in *Mellen* concluded without further discussion that "[t]he Purity Biscuit decision certainly needs a healthy reappraisement." 19 Utah 2d at 376, 431 P.2d at 800. Two years later in *Redman Warehousing Corp. v. Industrial Comm'n,* 22 Utah 2d 398, 454 P.2d 283 (1969), the Court again questioned the *Purity Biscuit* decision in a superficial analysis that concluded: "Purity enjoys the unique and doubtful distinction of being a living corpse." 22 Utah 2d at 403, 454 P.2d at 286. After considering those cases from Utah and other jurisdictions that have relied on *Purity Biscuit,* we now cannot agree that it was a "living corpse." Moreover, even if *Purity Biscuit* lay dormant, it was resurrected by *Schmidt v. Industrial Commission,* 617 P.2d 693, 695 (Utah 1980).

***21** Since *Purity Biscuit,* numerous cases have held that an internal injury may be compensable if it results from either a usual or unusual exertion in the course of employment. *See, e.g., Champion Home Builders v. Industrial Commission,* 703 P.2d 306 (Utah 1985) (perforated ulcer caused by lifting

an unusually heavy beam); *Pittsburg Testing Laboratories v. Keller,* 657 P.2d at 1367 (unforeseen and unanticipated heart attack resulting from exertion while inspecting roof structure); *Kaiser Steel Corp. v. Monfredi,* 631 P.2d 888 (Utah 1981) (back injury resulting from shoveling coal compensable despite usualness of activity and presence of preexisting conditions); *Painter Motor v. Ostler,* 617 P.2d 975 (Utah 1980) (back injury resulting from moving heavy boxes and installing electrical equipment); *Schmidt v. Industrial Commission,* 617 P.2d 693 (Utah 1980) (back injury resulting from carrying steel plates compensable despite prior history of back disorders and ordinary activity); *United States Steel Corp. v. Draper,* 613 P.2d 508 (Utah 1980) (heart attack resulting from exertion while rushing to drowning accident); *IGA Food Fair v. Martin,* 584 P.2d 828 (Utah 1978) (heart attack resulting from heavy lifting); *Nuzum v. Roosendahl Construction & Mining Corp.,* 565 P.2d 1144 (Utah 1977) (truck driver suffered heart attack after repeatedly climbing long steps); *Residential & Commercial Construction Co. v. Industrial Commission,* 529 P.2d 427 (Utah 1974) (back injury resulting from moving lumber); *Powers v. Industrial Commission,* 19 Utah 2d 140, 427 P.2d 740 (1967) (heart distress occurring over a period of several months compensable despite preexisting conditions); *Baker v. Industrial Commission,* 17 Utah 2d 141, 405 P.2d 613 (1965) (back injury resulting from filing papers in lower drawer compensable).

Despite the strong precedential support for applying the "unexpected result" rule of *Purity Biscuit* to internal failure cases, a separate line of opposing authority has developed which requires overexertion or an unusual event to prove an injury occurred "by accident." Typically, these cases denied compensation because the claimants' ordinary work duties precipitated the injury. Consequently, there were no events or exertions that were unusual or extraordinary to qualify as "by accident." *See, e.g., Billings Computer Corp. v. Tarango,* 674 P.2d 104 (Utah 1983) (compensation for knee injury denied where circumstances precipitating the injury were commonplace and usual); *Sabo's Electronic Service v. Sabo,* 642 P.2d 722 (Utah 1982) (back injury from loading box of twelve radios into van not compensable); *Farmer's Grain Cooperative v. Mason,* 606 P.2d 237 (Utah 1980) (back injury to claimant with preexisting condition resulting from delivery of 100-pound sacks not compensable since the activity was not unusual or unexpected); *Church of Jesus Christ of Latter-Day Saints v. Industrial Commission,* 590 P.2d 328 (Utah 1979) (back injury suffered by janitor upon standing up not compensable without evidence that activities were unusual); *Redman Warehousing Corp. v. Industrial Commission,* 22 Utah 2d 398, 454 P.2d 283 (1969) (back injury precipitated by sitting and driving a moving van not compensable without proof of an unusual event). These cases will not be collectively referred to as the *Redman* line of cases.

[2] We are now convinced that the *Redman* line of cases has misconstrued the historical and logical definition of "by accident." The *Redman* line of cases relied on the following abridged version of the definition of an accident found in *Carling v. Industrial Commission:* "[Accident] connotes an unanticipated, unintended occurrence *different from what would normally be expected to occur in the usual course of events.* " 16 Utah at 261, 399 P.2d at 203 (emphasis added; footnotes omitted). In *Redman,* the highlighted phrase was interpreted to require an unusual event before there can be an accident. This interpretation misconstrues the *Carling* decision itself and is inconsistent with the English definition of "by accident" used by this Court since 1922. The key requirement of an accident under the ***22** *Carling* decision, as well as prior decisions, was that the occurrence be unanticipated, unplanned and unintended. The highlighted phrase emphasized that where either the cause of the injury *or* the result of an exertion was different from what would normally be expected to occur, the occurrence was unplanned, unforeseen, unintended and therefore "by accident."

Policy considerations also militate in favor of rejecting the notion that the phrase "by accident" requires an unusual event. There is nothing in the term "accident" that suggests that only that which is unusual is accidental. *See Robertson v. Industrial Commission,* 109 Utah at 33, 40, 163 P.2d at 335, 338 (Wade, J., concurring; Wolfe, J., dissenting). An accident does not occur simply because a worker is injured during an unusual activity. This argument is illustrated by Professor Larson in his treatise on workmen's compensation with the following example:

> If an employee intentionally and knowingly undertakes to lift an unusual load, the cause (i.e., the lifting) is no more accidental than if he deliberately lifted a normal load. Or if a gardener deliberately continues to mow the lawn in the rain, a passerby observing him would not say that he was undergoing an accident merely because it is unusual to mow lawns in the rain.

Larson, *Workmen's Compensation* § 38.62, at 7-162 (1986) (footnotes omitted).

Larson also criticizes the usual-unusual distinction as being unworkable in practice. Realistically, it is impossible to determine what are the usual and normal requirements of a job. People work in good weather and bad, lift heavy items as well as light ones, and work for long hours as well as short ones. None of these activities may be unusual or unexpected. *Id.* § 38.63 at 7-164 to -168.

The unworkability of the usual-unusual event requirement is further evidenced by comparing seemingly irreconcilable decisions by this Court. *Compare Kaiser Steel v. Monfredi,* 631 P.2d 888 (back injury to miner with previous back problems held to be a compensable accident despite being caused by shoveling coal in the usual course of employment), *with Farmer's Grain Cooperative v. Mason,* 606 P.2d 237 (no accident where worker with previous back problems sustained back injury while delivering 100-pound bags of whey); *compare Baker v. Industrial Commission,* 17 Utah 2d 141, 405 P.2d 613 (compensable accident for back injury resulting from filing paper in lower drawer) *with Billings Computer Corp. v. Tarango,* 674 P.2d 104 (no accident where worker sustained knee injury resulting from bending to pick up small parts).

[3][4] We believe that the Court's real concern in the *Redman* line of cases was the presence or absence of *proof of causation* to support an award of compensation. *See generally Church of Jesus Christ of Latter-Day Saints,* 590 P.2d at 332 (Wilkins, J., dissenting). As will be discussed in the next section, the Court has developed two parallel lines of authority on the causation issue, one of which requires an unusual event in order to meet the statutory causation requirement. Although proof of an unusual event may be helpful in determining causation, it is not required as an element of "by accident" in section 35-1-45. "[T]he basic and indispensable ingredient of 'accident' is unexpectedness." *Schmidt,* 617 P.2d at 696 (Wilkins, J., concurring) (quoting 1B Larson, *Workmen's Compensation,* at 7-5 (1980). We therefore reaffirm those cases which hold that an accident is an unexpected or unintended occurrence that may be *either* the cause *or* the result of an injury. We thus necessarily abandon the analysis of "by accident" in the *Redman* line of cases which predicates the "accident" determination upon the occurrence of an unusual event.

II.

The second element of a compensable accident requires proof of a causal connection between the injury and the worker's employment duties. *Pittsburg Testing Laboratory v. Keller,* 657 P.2d 1367, 1370 (Utah 1983). In workers' compensation ***23** cases involving internal failures, the key issue is usually one of causation. Ordinarily, causation is proved by the production and interpretation of medical evidence either alone or together with other evidence. *See Keller,* 657 P.2d at 1367, 1370; *Schmidt v. Industrial Commission,* 617 P.2d 693, 695 (Utah 1980). Because of the difficulties of diagnosis of internal failures and because of the pos-

sibility that a preexisting condition may have contributed to the injury, special causation rules have been developed for internal failure cases. *See* Larson, *supra,* § 38.81, at 7-269; *Purity Biscuit Co. v. Industrial Commission,* 115 Utah 1, 20-21, 201 P.2d 970-71 (Wolfe, J., concurring specially).

This Court initially responded to the problem of causation in internal failure cases by suggesting that the Commission use a clear and convincing evidence standard when an internal failure was caused by an exertion in the workplace. [FN5] *See Thomas D. Dee Memorial Hospital Ass'n. v. Industrial Commission,* 104 Utah 61, 74, 138 P.2d 233, 238 (1943). The clear and convincing evidence standard was rejected, however, in *Lipman v. Industrial Commission,* 592 P.2d 616, 618 (Utah 1979), with the rationale that such a standard would make workers' compensation benefits nearly impossible to recover where the deceased suffered from a preexisting condition. Accordingly, the standard to prove causal connection is preponderance of the evidence. *Id.*

> FN5. In Nebraska, an enhanced standard of proof is still used where the employee suffers from a preexisting condition. *See Mann v. City of Omaha,* 211 Neb. 583, 592, 319 N.W.2d 454, 458 (1982).

The second method that has been used to ensure causal connection in internal failure cases is to require proof that an unusual event or activity precipitated the injury. Presumably, this requirement was used to prevent compensating a person predisposed to internal failure where the preexisting condition contributed more to the injury than his usual work activity. The following internal failure cases illustrate that evidence of an unusual event or activity is necessary to prove causation. *Billings Computer Corp. v. Tarango,* 674 P.2d 104, 106-07 (Utah 1983); *Sabo's Electronic Service v. Sabo,* 642 P.2d 722, 726 n. 12 (Utah 1982); *Church of Jesus Christ of Latter-Day Saints v. Industrial Commission,* 590 P.2d 328, 329 (Utah 1979); *IGA Food Fair v. Martin,* 584 P.2d 828, 829 (Utah 1978); *Nuzum v. Roosendahl Construction & Mining Corp.,* 565 P.2d 1144, 1146 (Utah 1977); *Jones v. California Packing Corp.,* 121 Utah 612, 244 P.2d 640 (1952); *Robertson v. Industrial Commission,* 109 Utah 25, 163 P.2d 331 (1945); *Thomas D. Dee Memorial Hospital Ass'n v. Industrial Commission,* 104 Utah 61, 138 P.2d at 233; *see Schmidt,* 617 P.2d at 697-99 (Crockett, J., dissenting); *Farmer's Grain Cooperative v. Mason,* 606 P.2d 237, 238-39 (Utah 1980); *Mellen v. Industrial Commission,* 19 Utah 2d 373, 374, 431 P.2d 798, 799 (1967); *Purity Biscuit,* 115 Utah at 30, 201 P.2d at 975 (Latimer, J., dissenting). Defendants argue that any rule that awards compensation based on usual exertion will open the floodgates for payment of benefits for all internal injuries that coincidentally occur at work. They claim that the unusual exertion requirement is necessary to prevent the employer from becoming a general insurer. They argue that without the unusual exertion rule, employment opportunities for persons with a history or indication of physical disability or handicap will be reduced.

Despite precedent supporting the "unusual exertion" rule, the claimant urges us to follow a separate line of authority that awards compensation for injuries that occur during usual and ordinary workplace activity. These cases typically award compensation where the claimant was engaged in a workplace activity and where there is adequate evidence of medical causation. *See, e.g., Kaiser Steel Corp. v. Monfredi,* 631 P.2d 888 (Utah 1981) (award for compensation affirmed for a coal miner's back injury despite absence of unusual incident); *Schmidt v. Industrial Commission,* 617 P.2d at 695 (compensation awarded for ***24** back injuries arising from ordinary duties upon proof of medical causal connection between workplace exertions and the injury); *Residential and Commercial Construction Co. v. Industrial Commission,* 529 P.2d 427 (Utah 1974) (carpenter's back injury from lifting, bending, and twisting in the ordinary course of work compensable); *Powers v. Industrial Commission,* 19 Utah 2d 140, 427 P.2d 740, 742 (1967) (awarding compensation to fireman for exertions in

the normal course of employment-the Court rejecting the unusual exertion test in favor of ordinary exertion); *Baker v. Industrial Commission,* 17 Utah 2d 141, 405 P.2d 613 (1965) (back injury from filing papers in lower drawer of cabinet compensable); *Purity Biscuit Co. v. Industrial Commission,* 115 Utah 1, 201 P.2d 961 (1949). Although the usual exertion rule was questioned in *Mellen v. Industrial Commission,* 19 Utah 2d at 375-76, 431 P.2d at 800, that decision failed to explicitly overrule the usual exertion line of cases. Moreover, *Residential and Commercial Construction Co., Schmidt,* and *Kaiser Steel* have awarded compensation for usual workplace activity after the *Mellen* decision. Clearly, the usual exertion rule is not simply an aberration in Utah law.

When read in chronological sequence, our opinions demonstrate an inconsistent and confused approach to determining when an accident arose out of or in the course of employment. Much of this confusion can be traced to fundamental problems stemming from the use of the usual-unusual distinction as a means of proving causation. Larson criticizes the unusual exertion requirement by itself as a "clumsy and ill-fitting device with which to ensure causal connection." Larson, *supra,* § 38.81, at 7-270. The problems in determining what activities were usual or unusual were recognized as long ago as 1949 when Justice Wolfe wrote that a "Pandora's box of difficulties ... may be opened by the refinements between usual and unusual, exertion and overexertion, ordinary and extraordinary exertion measured by the individual involved or by the industrial function performed by him or both." *Purity Biscuit,* 115 Utah at 23, 201 P.2d at 972 (Wolfe, J., concurring specially). The contents of the Pandora's box feared by Justice Wolfe are now evident in the plethora of our cases struggling with a definition of a compensable accident based upon the usualness or ordinariness of an activity.

Professor Larson has also criticized the usual-unusual distinction because the ordinariness of the activity fails to consider that some occupations routinely require a usual exertion capable of causing injury. Likewise, other occupations, such as deskwork, require so little physical effort that an "unusual exertion" may be insufficient to prove that the resulting accident arose out of the employment. Larson, *supra,* § 38.81, at 7-270.[FN6]

> FN6. Larson's observation is consistent with this Court's rationale for rejecting the unusual exertion requirement in *Purity Biscuit,* 115 Utah at 16, 201 P.2d at 968:
>
> > [I]f [overexertion] is the test no one will ever know what this court will consider sufficient overexertion. Also under that test if the work usually required by the job is so great that it would break the strongest man even he will not be able to recover. But if it is more than usual exertion which causes the injury the employee can recover no matter how light the work is which causes the injury.
>
> ***Id.***

[5] Because we find the present use of the usual-unusual distinction unhelpful and our prior precedent inconsistent, we take this opportunity to examine an alternative causation analysis that may better meet the objectives of the workers' compensation laws. We are mindful that the key question in determining causation is whether, given this body and this exertion, the exertion in fact contributed to the injury. *Id.* § 38.82, at 7-271; *Purity Biscuit,* 115 Utah at 23, 201 P.2d at 972 (Wolfe, J., concurring specially).

[6] The language "arising out of or in the course of his employment" found in U.C.A., 1953, § 35-1-45 (Supp.1986), was apparently intended to ensure that compensation is only awarded where there is a ***25** sufficient causal connection between the disability and the working conditions. The causation requirement makes it necessary to distinguish those injuries which (a) coincidentally occur at work because a preexisting condition results in

symptoms which appear during work hours without any enhancement from the workplace, and (b) those injuries which occur because some condition or exertion required by the employment increases the risk of injury which the worker normally faces in his everyday life. *See Bryant v. Masters Machine Co.,* 444 A.2d 329, 337 (Me.1982). Only the latter type of injury is compensable under U.C.A., 1953, § 35-1-45. There is no fixed formula by which the causation issue may be resolved, and the issue must be determined on the facts of each case.

[7] Professor Larson has suggested a two-part causation test which is consistent with the purpose of our workers' compensation laws and helpful in determining causation. We therefore adopt that test. Larson suggests that compensable injuries can best be identified by first considering the legal cause of the injury and then its medical cause. Larson, *supra,* § 38.83(a), at 7-273. "Under the legal test, the law must define what kind of exertion satisfies the test of 'arising out of the employment' ... [then] the doctors must say whether the exertion (having been held legally sufficient to support compensation) in fact caused this [injury]." [FN7] Larson, *supra,* § 38.83(a), at 7-276 to -277.

FN7. Cases from other jurisdictions which have accepted the dual-causation standard suggested by Larson include: *Market Foods Distribs., Inc. v. Levenson,* 383 So.2d 726 (Fla.Dist.Ct.App.1980) (claimant with preexisting spinal disease denied compensation where injury could have been triggered at any time during normal movement and exertion at work not greater than typical nonemployment exertion); *Guidry v. Sline Indus. Painters, Inc.,* 418 So.2d 626 (La.1982) (claimant granted compensation where injury resulted from stress, exertion, and strain greater than that in everyday nonemployment life); *Bryant v. Masters Mach. Co.,* 444 A.2d 329 (Me.1982) (claimant with preexisting condition awarded compensation for back injury resulting from fall from his stool at work because of increased risk of falling where employees moved around him at work); *Barrett v. Herbert Eng'g, Inc.,* 371 A.2d 633 (Me.1977) (claimant with preexisting back condition denied compensation for injury resulting from working at normal gait since there was no work-related enhancement of personal risk); *Mann v. City of Omaha,* 211 Neb. 583, 319 N.W.2d 454 (1982) (policeman with history of heart disease awarded compensation for heart attack at home where claimant's physician testified that attack was caused by stress of police work rather than personal risk factors); *Sellens v. Allen Prods. Co.,* 206 Neb. 506, 293 N.W.2d 415 (1980) (claimant with preexisting heart problems denied compensation for heart attack suffered while unloading 28-pound cases from truck trailer despite sedentary nonworking lifestyle using objective standard of average worker in nonemployment life); *Couture v. Mammoth Groceries, Inc.,* 116 N.H. 181, 355 A.2d 421 (1976) (claimant with no preexisting heart problems awarded benefits upon proof that lifting beef medically caused the fatal heart attack).

[8] 1. *Legal Cause*-Whether an injury arose out of or in the course of employment is difficult to determine where the employee brings to the workplace a personal element of risk such as a preexisting condition. Just because a person suffers a preexisting condition, he or she is not disqualified from obtaining compensation. Our cases make clear that "the aggravation or lighting up of a preexisting disease by an industrial accident is compensable...." *Powers v. Industrial Commission,* 19 Utah 2d 140, 143-44, 427 P.2d 740, 743 (1967) (footnote omitted). To meet the legal causation requirement, a claimant with a preexisting condition must show that the employment contributed something substantial to increase the risk he already faced in everyday life because of his condi-

tion. This additional element of risk in the workplace is usually supplied by an exertion greater than that undertaken in normal, everyday life. This extra exertion serves to offset the preexisting condition of the employee as a likely cause of the injury, thereby eliminating claims for impairments resulting from a personal risk rather than exertions at work. Larson, *supra,* § 38.83(b), at 7-278. Larson summarized how the legal cause rule would work in practice as follows:

> ***26** If there is some personal causal contribution in the form of a [preexisting condition], the employment contribution must take the form of an exertion greater than that of nonemployment life....
>
> If there is no personal causal contribution, that is, if there is no prior weakness or disease, any exertion connected with the employment and causally connected with the [injury] as a matter of medical fact is adequate to satisfy the legal test of causation.

Id. Thus, where the claimant suffers from a preexisting condition which contributes to the injury, an unusual or extraordinary exertion is required to prove legal causation. Where there is no preexisting condition, a usual or ordinary exertion is sufficient.[FN8]

> FN8. Larson highlights the difference between the unusual-usual exertion test with the rule we today adopt with the following examples of extreme cases in the heart attack area:
>
> > Suppose X's job involves frequent lifting of 200-pound bags, and one such 200-pound lift medically produces a heart attack. Under the old unusual-exertion rule there would be no compensation, regardless of previous heart condition. Under the suggested rule there would be compensation, even in the presence of a history of heart disease, because people generally do not lift 200-pound weights as a part of nonemployment life, and therefore this episode cannot be ascribed to the ordinary wear and tear of life.
> >
> > Suppose Y's job involves no lifting. Suppose he lifts a 20-pound weight on the job, and suppose there is medical testimony that this lift caused his heart attack. Under the old test, exclusively concerned with the comparison between this employee's usual exertions and the precipitating exertion, there would be compensation. Under the suggested rule the result would depend on whether there was a personal causal element in the form of a previously weakened heart. If there was not, compensation would be awarded, since the employment contributed something and the employee's personal life nothing to the cause of the collapse. If there was [a previously weakened heart], compensation would be denied in spite of the medical causal contribution, because legally the personal causal contribution was substantial, while the employment added nothing to the usual wear and tear of life-which certainly includes lifting objects weighing 20 pounds such as bags of golf clubs, minnow pails, and step ladders.
> >
> > Larson, *supra,* § 38.83, at 7-280-81 (footnote omitted).

[9] We also accept Larson's suggestion that the comparison between the usual and unusual exertion be defined according to an objective standard. "Note that the comparison is not with *this employee's* usual exertion in *his employment* but with the exertions of normal nonemployment life of this or any other person." Larson, *supra,* § 38.83(b), at 7-279 (emphasis in original). *See also Johns-Manville Products v. Industrial Commission,* 78 Ill.2d 171, 178, 35 Ill.Dec. 540, 544, 399 N.E.2d

606, 610 (1979) (compensation denied where the risk of the employment activity "is no greater than that to which he would have been exposed had he not been so employed"); *Strickland v. National Gypsum Co.,* 348 So.2d 497, 499 (Ala.Civ.App.1977) (employment risk must be " 'a danger or risk materially in excess of that to which people not so employed are exposed....' " *Quoting* from *City of Tuscaloosa v. Howard,* 55 Ala.App. 701, 705-06, 318 So.2d 729, 732 (1975)). ***But see*** *Market Foods Distributors, Inc. v. Levenson,* 383 So.2d 726, 727 (Fla.Dist.Ct.App.1980) (subjective test: "the employment must involve an exertion greater than that normally performed by the employee during his non-employment life"). Thus, the precipitating exertion must be compared with the usual wear and tear and exertions of nonemployment life, not the nonemployment life of the particular worker.

We believe an objective standard of comparison will provide a more consistent and predictable standard for the Commission and this Court to follow. In evaluating typical nonemployment activity, the focus is on what typical nonemployment activities are generally expected of people in today's society, not what this particular claimant is accustomed to doing. Typical activities and exertions expected of men and women in the latter part of the 20th century, for example, include taking full garbage cans to the street, lifting and carrying baggage for travel, changing a flat tire on an automobile, lifting a small child to chest height, and climbing the stairs in buildings. By ***27** using an objective standard, the case law will eventually define a standard for typical "nonemployment activity" in much the way case law has developed the standard of care for the reasonable man in tort law.

[10] 2. *Medical Cause*-The second part of Larson's dual-causation test requires that the claimant prove the disability is medically the result of an exertion or injury that occurred during a work-related activity. The purpose of the medical cause test is to ensure that there is a medically demonstrable causal link between the work-related exertions and the unexpected injuries that resulted from those strains. The medical causal requirement will prevent an employer from becoming a general insurer of his employees and discourage fraudulent claims.

> With the issue being one primarily of causation, the importance of the ... medical panel becomes manifest. It is through the expertise of the medical panel that the Commission should be able to make the determination of whether the injury sustained by a claimant is causally connected or contributed to by the claimant's employment.

Schmidt, 617 P.2d at 697 (Wilkins, J., concurring). Under the medical cause test, the claimant must show by evidence, opinion, or otherwise that the stress, strain, or exertion required by his or her occupation led to the resulting injury or disability. In the event the claimant cannot show a medical causal connection, compensation should be denied. FN9

> FN9. Evidence of the ordinariness or usualness of the employee's exertions may be relevant to the medical conclusion of causal connection. Where the injury results from latent symptoms with an illness such as heart disease, proof of medical causation may be especially difficult. Larson's treatise cites many examples of cases where compensation claims were defeated because of inadequate proof of medical causation. *See* Larson, *supra,* § 38.83(i), at 7-319 to -321. *Compare Guidry v. Sline Indus. Painters, Inc.,* 418 So.2d 626 (La.1982) (heart attack triggered by stress, exertion, and strain greater than sedentary life of average worker compensable).

III.

[11] We now undertake to apply the foregoing analysis to the case before us. In reviewing findings of fact of the Industrial Commission, we determine whether there is substantial evidence to support the Commission's findings. *Champion Home Builders*

v. Industrial Commission, 703 P.2d 306, 307 (Utah 1985).

[12] We have previously stated that the key element of whether an injury occurred "by accident" is whether the injury was unexpected. After reviewing the record, we find no substantial evidence that the injury was not unexpected. It is clear from the uncontradicted testimony of the claimant that he experienced an unexpected and unanticipated injury to his back as he lifted a crate of milk in the cramped area of the cooler. Although the claimant had injured his back on prior jobs, he had not complained of pain or limitations at his job with Kent's Foods. There is no evidence which indicates that this injury was predictable or that it developed gradually as with an occupational disease or progressive back disorder. While the employer's report of injury and the medical records do not corroborate that a sudden and identifiable injury occurred in the cooler, the reports are unhelpful in determining whether the injury was unexpected.

It appears that the administrative law judge applied the "unusual event or trauma" rule in defining an accident. We have rejected that test in lieu of a test based on unexpectedness. Moreover, the administrative law judge's emphasis on prior injuries is not determinative of whether an accident occurred. We have previously held that the aggravation or "lighting up" of a preexisting condition by an internal failure is a compensable accident. *Powers v. Industrial Commission,* 19 Utah 2d 140, 143, 427 P.2d 740, 743 (1967). We conclude therefore that the decision of the Commission that the claimant's injury was not "by accident" was not based on the evidence, and that decision is, therefore, erroneous.

[13] The key issue in this case, like most internal failure cases, is whether the injury "arose out of or in the course of ***28** employment." Since the claimant had previous back problems, to meet the legal causation requirement he must show that moving and lifting several piles of dairy products weighing thirty to fifty pounds in the confined area of the cooler exceeded the exertion that the average person typically undertakes in nonemployment life. The evidence presented by the claimant was insufficient for us to make a determination regarding legal causation. It is unclear from the record how many crates were moved by the claimant, the distance the crates were moved, the precise weight of the crates, and the size of the area in which the lifting and moving took place. Because the claimant did not have the benefit of the foregoing opinion, we remand for further fact-finding on this issue.

Moreover, the record is insufficient to show medical causation. It is unclear from the medical reports whether the doctors were aware of the specific incident in the cooler. Further, the case was not submitted to a medical panel for its evaluation. Without sufficient evidence of medical causation, we are unable to determine whether there is a medically demonstrable causal link between the lift in the cooler and the injury to the claimant's back. We therefore remand to the Industrial Commission for additional evidence and findings on the question of medical causation.

The decision of the Commission is vacated and remanded.

HOWE and ZIMMERMAN, JJ., concur.

HALL, Chief Justice: (concurring and dissenting).

I concur in remanding this case to the Commission for the purpose of determining whether the work incident aggravated a preexisting condition such as would warrant an award of compensation. [FN1] However, I do not join the Court in adopting an "unexpected result" standard to be applied in determining the existence of a compensable accident.

> FN1. *Powers v. Industrial Comm'n,* 19 Utah 2d 140, 143-44, 427 P.2d 740, 743 (1967).

I do not believe that this Court has "misconstrued the historical and logical" definition of "by accident" in the bulk of its recent cases concerning the issue at bar. The majority's reliance

upon *Purity Biscuit Co. v. Industrial Commission* [FN2] is misplaced. The holding therein is without precedential value because it has been simply ignored.[FN3] The only case in which this Court followed *Purity Biscuit* is *Schmidt v. Industrial Commission,* [FN4] which support is similarly without precedential value because it has also been ignored beginning with *Painter Motor Co. v. Ostler,* [FN5] the very next accident case handed down. In that case, the Court cited and relied upon *Carling v. Industrial Commission* [FN6] and again defined "accident" as an unanticipated, unintended occurrence different from what would normally be expected to occur in the usual course of events. In my view, *Purity Biscuit* and *Schmidt* emerge as aberrations in our post-war case law.

FN2. 115 Utah 1, 201 P.2d 961 (1949).

FN3. *Emery Mining Corp. v. DeFriez,* 694 P.2d 606 (Utah 1984); *Giles v. Industrial Comm'n,* 692 P.2d 743 (Utah 1984); *Frito-Lay, Inc. v. Jacobs,* 689 P.2d 1335 (Utah 1984); *Billings Computer Corp. v. Tarango,* 674 P.2d 104 (Utah 1983); *Sabo's Elec. Serv. v. Sabo,* 642 P.2d 722 (Utah 1982); *Kaiser Steel v. Monfredi,* 631 P.2d 888 (Utah 1981); *Farmer's Grain Cooperative v. Mason,* 606 P.2d 237 (Utah 1980); *Church of Jesus Christ of Latter-Day Saints v. Industrial Comm'n,* 590 P.2d 328 (Utah 1979); *Redman Warehousing Corp. v. Industrial Comm'n,* 22 Utah 2d 398, 454 P.2d 283 (1969); *Carling v. Industrial Comm'n,* 16 Utah 2d 260, 399 P.2d 202 (1965).

FN4. 617 P.2d 693 (Utah 1980).

FN5. 617 P.2d 975 (Utah 1980).

FN6. 16 Utah 2d 260, 399 P.2d 202 (1965) .

The majority opinion holds that henceforth an injury by accident "is an unexpected or unintended occurrence that may be *either* the cause *or* the result of an injury." (Emphasis in original.) However, the legislature, whose prerogative it is to establish policy, has chosen wording which precludes such an interpretation. The reasoning of Justice Latimer's dissent in *Purity*29 Biscuit* illustrates the shortcomings of the majority's interpretation. The word "accident," when viewed in isolation, may be used to denote both an unexpected occurrence which produces injury as well as an unexpected injury. The word "injury," on the other hand, denotes a result and not a cause. Had the legislature only used the word "injury" in section 35-1-45 (U.C.A., 1953, § 35-1-45 (Repl. Vol. 4B, 1974 ed., Supp.1986)), then that statute would cover all results regardless of the cause. Had the legislature only used the word "accident," then I would agree with the majority's holding today that the legislature intended to cover both the cause and the result. In fact, however, the legislature has used both words "injury" and "accident." It follows that the word "accident" must be interpreted as focusing upon the cause and not the result. In short, the majority's interpretation writes the word "injury" out of the statute. Such a decision is unwarranted in my view.

The legislature recently amended section 35-1-45,[FN7] but chose to leave intact the standard which limits the payment of compensation to those injured "by accident arising out of or in the course of ... employment." [FN8] Moreover, the singular "injury by accident" standard has not been altered or amended since its inception in 1917.[FN9] The legislature thus being satisfied with the Court's interpretation of the term "accident" in the long line of cases beginning with *Carling v. Industrial Commission,* [FN10] I decline to embark upon a new effort to redefine that term.

FN7. Act of Jan. 27, 1984, ch. 75, § 1, 1984 Utah Laws 610, 610.

FN8. U.C.A., 1953, § 35-1-45 (Repl.Vol. 4B, 1974 ed., Supp.1986).

FN9. Act of March 18, 1917, ch. 100, §

52a, 1917 Utah Laws 306, 322-23.

FN10. 16 Utah 2d 260, 399 P.2d 202 (1965).

STEWART, Justice: (dissenting).

I dissent. The majority defines the statutory term "accident" to mean "unexpected result," regardless of whether it is produced by a usual or an unusual event. The majority also defines the term "arising out of or in the course of employment" to impose legal and medical causation requirements. *See* U.C.A., 1953, § 35-1-45.

Curiously, the requirement of "legal causation" has two different meanings, depending upon the physical condition of the worker at the time he is injured. A worker having no preexisting medical condition or handicap need only prove that the accident was caused by a "usual or ordinary exertion." But for congenitally handicapped persons and for persons who have suffered preexisting industrial injuries (which presumably have left the worker with some physical weakness or deterioration), legal causation has a different meaning. Such a worker may receive compensation only if the "employment contribution" to the internal breakdown is "greater than that of nonemployment life." According to the majority, such a worker must now prove that his internal breakdown was caused by " *an unusual or extraordinary exertion"* in order to establish the requisite legal causation, even though the majority opinion itself criticizes at length the "usual-unusual distinction as a means of proving causation." How the majority can reject that standard for persons having no preexisting condition, yet embrace that standard for persons with preexisting conditions, is baffling.

Furthermore, the difference between the "unusual or extraordinary exertion" which a worker with a preexisting condition must demonstrate and the "usual exertion" which a person with no preexisting condition must demonstrate is far from clear. The latter standard is to be judged with respect to the " 'normal nonemployment life of this or any other person.' " The Court emphasizes that the "precipitating exertion must be compared with the usual wear and tear and exertions of nonemployment life, not the nonemployment life of the particular worker." What the term "usual wear and tear and exertions of nonemployment" means is not defined by the ***30** majority. The few examples set out do little to explain the concept aimed at, other than to suggest that the term means something more than simple, life-sustaining activities.

I wholly fail to understand why persons who have a preexisting condition should be placed in the disadvantaged position, indeed the near-remediless position, that the majority opinion imposes upon them. The purpose of the Second Injury Fund is to provide compensation for workers who have preexisting medical conditions and therefore run a greater risk of injury when they expose themselves to the hazards of the work place. But the law should encourage such persons to work rather than encouraging them to abandon the work force for some kind of unearned support.

This Court has repeatedly stated that the Second Injury Fund was designed to encourage employers to hire persons with preexisting conditions by spreading the risk throughout the industry to assure such persons that their injuries will be cared for without imposing extraordinary liabilities on the employers who hire them. *Intermountain Smelting Corp. v. Capitano,* 610 P.2d 334, 337 (Utah 1980); *McPhie v. United States Steel Corp.,* 551 P.2d 504, 505 (Utah 1976). Society certainly ought to favor those policies which encourage people to work, rather than policies that deter employers from offering gainful employment to those who have a higher risk of work-related injury. There is little personal or social benefit from a policy that tends to discourage persons from working because of prior injuries or disabilities.

Further, it is fundamentally unfair and flatly inconsistent with the basic purposes of the workmen's compensation laws to impose higher standards for

compensation on those with preexisting medical conditions than on those without. Tort law generally does not do so. A defendant in a negligence action is required to take the victim as the defendant finds him; whatever unusual vulnerabilities the victim may have are disregarded. That principle should not be, and until now has not been, different in workmen's compensation law, which is really a substitute for tort law remedies. In short, handicapped or previously injured persons who are injured by an industrial accident are simply discriminated against by having to meet the majority's rigorous legal cause requirement.

I am also unable to understand how an administrative law judge, the Industrial Commission, or an appellate court is supposed to determine what "typical nonemployment activities" are "in today's society," as they now must do for the purpose of determining legal causation for workers with preexisting medical conditions. Does that mean what a typical sixty-five-year-old does or a typical twenty-one-year-old does during his or her nonemployment activities? Is it what a professional football player does in his leisure time or what a ballet dancer does? Is it what a sedentary worker does in his or her off-hours or what a forest ranger does?

Instead of defining a meaningful standard, the majority provides examples which supposedly illustrate the unarticulated principle. The examples "include taking full garbage cans to the street, lifting and carrying baggage for travel, changing a flat tire on an automobile, lifting a small child to chest height, and climbing the stairs in buildings." These few examples, which I find to be arguable in any event since they reflect only what some people may do from time to time, do not substitute for a legal standard. I seriously wonder whether changing a flat tire on an automobile is a typical activity in today's society, and I do not know how much luggage the "typical" individual lifts or how far he or she carries it. The point is that the majority has not set forth a workable standard at all. In fact, I have serious doubt that such an artificial construct as "typical nonemployment activities" will produce more fair and rational decisions than our past cases. The majority simply assumes a "typical" individual for the purpose of establishing a rational standard. Unfortunately, disabilities happen to real people, not to "average" people, and the law has always recognized ***31** as much. In short, I do not think that the majority's newly established standard will produce decisions one whit more consistent or rational than those produced in the past.[FN1]

> FN1. In my view, the decisions of this Court are generally reconcilable with only a few glaring exceptions and most of them prior to 1980. That there are more inconsistencies the further back one goes in our body of law is not particularly unexpected. In any event, I doubt that the new approach will produce unwavering consistency over the years.

The majority also holds that an injured person must prove that the disability is "medically the result of an exertion or injury that occurred during a work-related activity." With a degree of hope that I think is unwarranted, the majority states that "[t]he medical causal requirement will prevent an employer from becoming a general insurer of his employees and discourage fraudulent claims." I am fearful that that hope is seriously misplaced.

Certainly Professor Larson, largely the source of the Court's new standards and analysis, is highly acclaimed in this field of law, but there is much to be said for the case-by-case approach in hammering out legal doctrine, even if it does on occasion produce inconsistencies. I readily concede that present law needs to be rationalized and that some cases should be overruled because they are hopelessly inconsistent with other cases, but I do not believe that the law needs to be revolutionized in such a manner as to defeat those humane policies intended to allow for the injuries of workers who come to the work place in an impaired condition.

I also join the Chief Justice's dissent.

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(Cite as: 729 P.2d 15)

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